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IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

CIVIL DIVISION

In re the matter of
LEONARD RODBERG

Civil Action
No. EBD-71-172-G

MOTION TO INTERVENE

Comes now Movant, United States Senator Mike Gravel and moves this Honorable Court for leave to intervene in the above captioned cause and as reasons therefore states:

- 1) Leonard Rodberg is a personal servant of the Movant.
- 2) As Movant's personal servant, Leonard Rodberg has performed acts which are now the subject of an inquiry by a Federal Grand Jury.
- 3) The aforesaid Federal Grand Jury has subpoenaed Leonard Rodberg to appear and give testimony with respect to the aforesaid acts on Friday, August 27, 1971 at 10 A.M.
- 4) All of the aforesaid acts performed by Leonard Rodberg for the Movant were under the Movant's direction and control.
- 5) All of the acts performed by Leonard Rodberg upon orders from the Movant are immune from judicial inquiry by virtue of Movant's constitutional privileges and constitutional duties.
- 6) The question presented herein raises serious and substantial constitutional issues which have not but should be decided by this Court.
- 7) No other party to the above captioned cause can adequately represent the interest of Movant.
- 8) The granting of this motion would best serve the interest of Justice.

WHEREFORE, Movant respectfully requests that this Honorable Court grant the above captioned Motion to Intervene..

Robert Reinstein
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of Law
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215-787-8576

Charles Louis Fishman
Attorney for Movant
633 East Capitol Street
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Of Counsel:

Herbert O. Reid, Sr.

MOTION FOR SPECIFICATION

Comes now movant, United States Senator Mike Gravel, and respectfully moves this Court for an Order requiring the Government to specify in detail the purpose, scope and exact nature of the questions to be asked of Dr. Leonard Rodberg by the Federal grand jury. Movant submits that absent such specification, the appearance of Dr. Rodberg before the grand jury will violate movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, movant states as follows:

1. Dr. Rodberg was served with a subpoena on Tuesday, August 24, 1971, which seeks to compel Dr. Rodberg's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

2. Dr. Rodberg is a personal servant of movant and assisted movant in the discharge of his duties as a United States Senator, and in so doing has acted under movant's direction and control.

3. - In his aforesaid capacity as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.

4. It is believed that the questions to be asked of Dr. Rodberg by the grand jury will concern the acts of movant and of Dr. Rodberg set forth in paragraphs 2 and 3.

5. All of the said acts performed by movant and by Dr. Rodberg are immune from judicial inquiry by virtue of movant's constitutional privileges and constitutional duties.

Respectfully submitted,

ROBERT J. REINSTEIN
1715 N. Broad Street
Philadelphia, Pa. 19122

CHARLES L. FISHMAN
633 E. Capitol Street
Washington, D. C. 20003

Attorneys for Senator Gravel

MOTION TO QUASH GRAND JURY SUBPOENA

Comes now movant, United States Senator Mike Gravel, and respectfully moves this Court for an order quashing a subpoena served upon Dr. Leonard Rodberg on Tuesday, August 24, 1971, which seeks to compel Dr. Rodberg's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

Movant submits that the subpoena served upon Dr. Rodberg should be quashed because it violates movant's Con-

gressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, movant states as follows:

1. Dr. Rodberg is a personal servant of movant and has assisted movant in the discharge of his duties as a United States Senator, and in so doing has acted under movant's direction and control.
2. In his aforesaid capacity as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.
3. It is believed that the questions to be asked of Dr. Rodberg by the grand jury will concern the acts of movant and of Dr. Rodberg set forth in paragraphs 1 and 2.
4. All of the said acts performed by movant and by Dr. Rodberg are immune from judicial inquiry by virtue of movant's constitutional privileges and constitutional duties.
5. The appearance of Dr. Rodberg before the grand jury would violate movant's constitutional privileges.

Respectfully submitted,

ROBERT J. REINSTEIN
1715 N. Broad Street
Philadelphia, Pa. 19122

CHARLES L. FISHMAN
633 E. Capitol Street
Washington, D.C. 20003

Attorneys for Senator Grayel

MOTION TO QUASH GRAND JURY SUBPOENA AND TO STAY GRAND JURY APPEARANCE PENDING DISPOSITION OF THIS MOTION.

Dr. Leonard S. Rodberg respectfully moves this Court for order quashing a subpoena served upon him on Tuesday, August 24, 1971, which seeks to compel his appearance before a federal grand jury sitting in this district, to wit, in Boston, Massachusetts, on Friday, August 27, 1971 at 10:00 a.m. Alternatively, Dr. Rodberg moves for the entry of a protective order limiting the questioning of movant before the grand jury to a scope consistent with law. Further, Dr. Rodberg respectfully requests that his subpoena be adjourned and his appearance before the grand jury be stayed pending disposition of this motion and that he be permitted time in which to prepare and submit to this Court substantial affidavits and other documentary material in support of this motion.

Movant submits that his subpoena should be quashed upon, *inter alia*, each of the following independent grounds:

- a. That it violates Congressional privilege, separation of powers and the Speech and Debate Clause;
- b. That it abridges movant's rights to freedom of the press, freedom of expression and freedom of association in violation of the First Amendment.

In support of paragraphs (a) and (b), movant alleges as follows:

1. On June 29, 1971 Mike Gravel, United States Senator from the State of Alaska, in the course of a meeting of the Senate Subcommittee on Public Buildings and Grounds read publicly a portion of the so-called "Pentagon Papers," and inserted the rest of the papers in his possession into the record of the subcommittee.

2. Immediately after that reading and at the express direction of Senator Gravel, aides and assistants to the Sen-

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ator distributed to members of the press and others copies of the papers from which Senator Gravel had read.

3. On the night of June 29, 1971, movant was and continues to be, down to the present date, a member of Senator Gravel's staff.

4. On Wednesday, August 18, 1971, it was reported and alleged in the *Washington Post* that Senator Gravel had turned over copies of the "Pentagon Papers" to a Boston, Massachusetts, publisher for publication as a book. It was further alleged that movant here had arranged on Senator Gravel's behalf the transfer and publication of these papers. It was further alleged that movant here had made previous unsuccessful efforts to arrange publication of the papers in Senator Gravel's possession. See *Washington Post* article attached hereto as Exhibit "A."

5. On Tuesday, August 24, 1971, it was reported and alleged in an article in "Boston After Dark," a weekly newspaper, that, after several earlier unsuccessful attempts, movant had, at Senator Gravel's behest, arranged the publication of the papers in Senator Gravel's possession. See the article attached hereto as Exhibit "B."

6. On the evening of that same day, Tuesday, August 24, movant was served at his home in Silver Spring, Maryland, by an agent of the Federal Bureau of Investigation with the instant subpoena which seeks to compel his appearance on Friday, August 27 at 10:00 a.m. before a federal grand jury here in Boston. See subpoena attached hereto as Exhibit "C."

7. It is believed (as shown in the affidavit attached hereto) that the questions to be asked of movant before the grand jury will concern the June 29 meeting of the Subcommittee on Public Buildings and Grounds and the distribution of papers that occurred immediately thereafter.

8. It is further believed that the questions to be asked of movant before the grand jury will concern the allegation made in the newspaper articles attached hereto as Exhibits "A" and "B" that he has been involved in an effort to pub-

lish as a book the documents in Senator Gravel's possession.

9. Movant believes that an appearance for the purpose of questioning him regarding these matters raises substantial and fundamental issues concerning the scope of Congressional privilege and of the Speech and Debate Clause, and the distribution of governmental authority among the separate and distinct branches of government.

10. Movant further believes that such questions raise important and delicate issues regarding First Amendment freedom, particularly freedom of the press, freedom of expression and freedom of association.

11. Movant therefore sought to retain legal counsel in connection with his appearance before the grand jury.

* * * * *

GOVERNMENT OPPOSITION TO INTERVENOR'S MOTION FOR SPECIFICATION

Intervenor, United States Senator Mike Gravel, requests the Court for an Order requiring "... the government to specify in detail the purpose, scope and exact nature of the questions to be asked of Dr. Leonard Rodberg by the Federal Grand Jury." The motion is totally without precedent. The Federal Rules of Criminal Procedure certainly do not provide for such an unusual motion. The Federal Rules of Civil Procedure do provide for a "Motion for More Definite Statement," but this is not what movant is requesting, nor is this a civil matter governed by the Federal Rules of Civil Procedure.

On the merits, a witness need not be apprised of the subject matter under inquiry by a Grand Jury. *In Re Meckley*, (D.C.M.D. Penn. 1943), 50 F. Supp. 274; *affd.* 137 F.2d 310; *cert. den.* 320 U.S. 370.

Further, a witness can neither question nor control the scope of a Grand Jury investigation. *Blair v. United States*, 250 U.S. 273.

WHEREFORE, this motion should be denied.

Respectfully submitted,

PAUL C. VINCENT

Attorney — U.S. Department
of Justice

JON H. MARPLE

Attorney — U.S. Department
of Justice

**GOVERNMENT'S MEMORANDUM IN OPPOSITION TO
LEONARD S. RODBERG'S MOTION TO
QUASH A GRAND JURY SUBPOENA**

* * * * *

Should legislators succeed in disregarding the judicial powers of inquiry into criminal conduct by refusing compliance with a Grand Jury subpoena, they would have elevated themselves above the criminal law virtually by their bootstraps. No testimony sought here will seek to review a Congressman's political views, his motives or any exercise of legislative discretion. In responding to a subpoena, Senator Gravel would only fulfill his own duty as a citizen to assist the Executive branch in its own Constitutional obligation to enforce the laws of the United States. Should questioning prove self-incriminating, the Senator would retain his own Fifth Amendment privilege, in this regard. To withhold testimony on the basis of exemption would frustrate the separation of powers doctrine by interfering in executive proceedings, and in this case to forswear Senator Gravel's own vested duty to uphold the Constitution and laws of the United States.

* * * * *

The Government neither affirms nor denies that this proceedings is brought to investigate the disclosure of the so-called "Pentagon Papers". Yet assuming *arguendo*, that such be the case the Senator could not claim further that the grand jury cannot lawfully inquire into the business of reading and publishing the "Pentagon Papers" as it constitutes privileged legislative business. The speech and debate clause has been construed to protect not only speeches given on the floor of Congress, as in *Johnson, supra*, but also to protect debates and speeches in committee hearings, as well as reports, resolutions, the act of voting and "in short, to things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880). Yet the action of Senator Gravel which he assumes has led to the subpoena of Dr. Rodberg stands in no such footing. The Senator convened a special, unauthorized, and untimely meeting of the Senate Subcommittee on Public Works (at midnight on June 29, 1971), for the purpose of reading the documents and thereafter placed all unread portions in the subcommittee record, with Dr. Rodberg soliciting publication following the meeting. (See news articles attached to motion of Dr. Rodberg). The Congress does not enjoy uncurbed power to conduct business; excursions of committee hearings into private lives unconnected with a legitimate legislative purpose have long been held unconstitutional. *Kilbourn v. Thompson, supra; Marshall v. Gordon*, 243 U.S. 531 (1917). The power of the judiciary to reject unauthorized legislative activity stands upon no less a precedent than *Marbury v. Madison*, 1 Cranch (5 U.S.) 87 (1803). The prerogative of Judicial review has been exercised often in recent years to curb extra-legislative excursions by Congressional committees. *Watkins v. United States*, 354 U.S. 178 (1957); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Hentoff v. Ichord*, 318 F. Supp. (D.C. 1970). The reading of the paper in question can have no possible relationship to the legislative business with which Senator Gravel has sought to cloak himself.

Not being engaged in official subcommittee business, his actions cannot be above scrutiny by those charged to enforce the criminal statutes.

* * *

Such a privilege, being derivative in nature, cannot be claimed where it would not protect the Senate member concerned; here, Senator Gravel can himself claim no exemption. The Speech and Debate clause was enacted in its present form specifically to insure that Senators would remain subject to obligations and sanctions of the criminal law and it has been applied in precisely this fashion for over 170 years. Accordingly, legislators have been deemed subject to subpoena and have occasionally been prosecuted. Under the "privilege" provision, Congressmen and their servants have always been subject to judicial limitations upon their actions where, even though garbed in the trappings of Congressional propriety, they have issued subpoenas or ordered imprisonment which transgressed their Constitutional powers. Thus, this court has complete powers to find that the activities in which the Senator and Dr. Rodberg were engaged were far removed from legitimate Congressional business and cannot therefore claim the protection of the privilege clause.

* * *

AFFIDAVIT OF MIKE GRAVEL

I, Mike Gravel, being first duly sworn, do depose and say that Dr. Leonard Rodberg is, and has been since June 29, 1971, a member of my personal staff in the United States Senate.

MIKE GRAVEL

Commonwealth of Massachusetts
Suffolk, ss.

Subscribed and Sworn to
before me this 10th day
of September, 1971.

Margaret M. Flaherty
NOTARY PUBLIC

My Commission expires: 11/6/75

AFFADAVIT OF ROBERT G. DUNPHY

Robert G. Dunphy, Sergeant at Arms, United States Senate, Washington, D.C. 20510, being duly sworn, deposes and says:

1. By letter to me dated June 29, 1971, Senator Gravel designated Dr. Leonard Rodberg as a member of his personal staff. Senator Gravel's letter is set forth below:

"Mr. Robert G. Dunphy
Sergeant at Arms
United States Senate
Washington, D.C. 20510

Dear Mr. Dunphy:

Effective this date please add to my personal staff roll the name of Dr. Leonard Rodberg.

Dr. Rodberg will serve as a special assistant to me, with full access to my office, performing duties I assign and under my direct supervision.

Sincerely,

Mike Gravel"

Robert G. Dunphy
Sergeant at Arms
United States Senate

Subscribed and Sworn to before me this 10th day of September, 1971. My Commission expires on the 14th day of Dec. 1971.

Notary Public
Wm. R. Luirs

MOTION FOR FURTHER RELIEF

Comes now Movant, Mike Gravel, United States Senator, and respectfully moves this Court for an order granting further relief to prevent the abridgement of Movant's constitutional rights under the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, Movant states as follows:

1) This Court has under consideration Movant's Motion for Reconsideration and/or Stay Pending Appeal of this Court's Memorandum of decision and Protective Order entered on October 4, 1971 in the above captioned cause.

2) The United States has subpoenaed certain witnesses for the purpose of inquiring into matters protected from inquiry by Article I, Section 6, Clause 1 and the Protective Order issued by this Court on October 4, 1971. Specifically, the government wishes to inquire into how and from whom Movant received certain material commonly referred to as the Pentagon Papers.

3) The United States has subpoenaed certain other witnesses for the purpose of inquiring into Movant's publication of the official transcript of the Senate Subcommittee on Building and Grounds. The constitutional permissibility of such an inquiry is now before the Court for reconsideration in the above captioned cause.

4) Movant has no control over the willingness of those subpoenaed to answer questions prohibited by this Court's Protective Order of October 4, 1971 or Article I, Section 6, Clause 1.

5) Movant has no control over the willingness of those subpoenaed to answer questions concerning Movant's publication of the official transcript of the aforesaid Senate Subcommittee.

6) If this Court decides that publication of the official record of a Senate Subcommittee is constitutionally protected the grand jury will be barred from questioning anyone about his conduct with respect thereto.

7) If this Court decides that publication of the official record of a Senate Subcommittee is not constitutionally protected Movant has asked for a stay of this Court's decision pending appeal. To permit any witness to testify with respect to the publication of the aforesaid transcript would moot the constitutional claim of Movant prior to the final resolution of the important and complex constitutional issues presented herein.

8) If the United States seeks answers to questions prohibited by this Court's Protective Order of October 4, 1971, Movant has no procedure with which to object and to secure a ruling from this Court.

9) If the United States seeks answers to questions concerning publication of the aforesaid official record of a Senate Subcommittee now under submission to this Court, Movant has no procedure with which to object and to secure a ruling from this Court.

10) If this Court permits inquiry into the aforesaid areas and others before the grand jury Movant's constitutional right will have been irreparably violated.

WHEREFORE, Movant respectfully requests this Honorable Court to grant the following further relief:

1) To require a listing from the United States of all those who have been subpoenaed or are to appear before the grand jury to give testimony.

2) To hold a hearing to determine which of the listed witnesses has privileged information which, constitutionally, cannot be inquired into, or should not be inquired into pending final determination on reconsideration.

3) To require the United States to specify all questions to be asked each witness, covered by Paragraph 2 above, and to rule on the constitutional permissibility of each said question.

If this Court should deny this Motion, Movant requests this Court to grant a stay of all subpoenas now outstanding or to be issued, pending appeal to the United States Court of Appeals for the First Circuit.

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202-546-0520

Attorney for Movant

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202-636-6671

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Division

MIKE GRAVEL,
UNITED STATES SENATOR

v.

Civil Action No. E.B.D. 71-209-G

JOHN DOE

In re the matter of
HOWARD WEBBER

MOTION TO INTERVENE

Comes now Movant, United States Senator Mike Gravel and moves this Honorable Court for leave to intervene in the above captioned cause and as reasons therefore states:

- 1) Howard Webber is the editor of M. I. T. Press.
- 2) As the editor of M. I. T. Press, Mr. Webber had contact and discussions with members of Movant's personal staff which contacts and discussions are now the subject of an inquiry by a Federal Grand Jury.
- 3) The aforesaid Federal Grand Jury has subpoenaed Mr. Webber to appear and give testimony with respect to the aforesaid contact and discussion on Wednesday or Thursday, October 27 or 28, 1971.
- 4) All of the aforesaid contacts and discussions between Mr. Webber and members of Movant's personal staff relate to the publication of the June 29, 1971 official transcript of the United States Senate Subcommittee on Buildings and Grounds.
- 5) All of the aforesaid contacts and discussions between Mr. Webber and Movant's personal servants are immune from judicial inquiry by virtue of Movant's constitutional privileges and duties.

6) The question presented herein raises serious and substantial constitutional issues which have not but should be decided by this Court.

7) No other party to the above captioned cause can adequately represent the interest of Movant.

8) The granting of this motion would best serve the interest of Justice.

9) Movant has no information upon which to determine if Mr. Webber plans to appear before the Grand Jury and give testimony in violation of Movant's constitutional rights.

WHEREFORE, Movant respectfully requests that this Honorable Court grant the above captioned Motion to Intervene.

Charles Louis Fishman
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202-546-0520

Attorney for Movant

Robert Reinstein
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Howard O. Reid, Sr.
Howard University School
of Law
Washington, D. C.
202-636-6671

MOTION TO QUASH OR STAY GRAND JURY SUBPOENA

Comes now Movant, United States Senator Mike Gravel, and respectfully moves this Court for an order quashing or staying a subpoena served upon Howard Webber which seeks to compel Mr. Webber's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

Movant submits that the subpoena served upon Mr. Webber should be stayed because it violates Movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to Movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

1) The United States has subpoenaed Mr. Webber for the purpose of questioning him about the publication of the official Senate Subcommittee transcript involved in the case of *Mike Gravel, United States Senator v. United States* (Docket No. EBD 71-172).

2) This Court has under consideration Movant's Motion For Reconsideration in the case of *Mike Gravel, United States Senator v. United States* (Docket No. EBD 71-172).

3) If this Court decides that publication of the official record of a Senate Subcommittee is constitutionally protected the grand jury will be barred from questioning anyone, including Mr. Webber, about his conduct with respect thereto.

4) If this Court decides that publication of the official record of a Senate Subcommittee is not constitutionally protected Movant has asked for a stay of this Court's decision pending appeal. To permit Mr. Webber to testify with respect to the publication of the aforesaid transcript would moot the constitutional claim of Movant prior to the final resolution of the important and complex constitutional issues presented herein.

5) No substantial injury will result to the United States from the granting of this Motion.

WHEREFORE, Movant respectfully requests that this Honorable Court grant the above Motion to Quash or Stay the subpoena served upon Howard Webber pending final disposition of the case entitled *Mike Gravel, U. S. S. v. United States* EBD 71-172.

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UNITED STATES V. JOHN DOE

STEPHEN PARKHURST,

*Vice-President and Cashier, New England Merchants Bank,
Prudential Center, Boston, Mass.*

You are hereby commanded to appear in the United States District Court for the District of Massachusetts at P.O. & Courthouse Building, in the city of Boston on the 10th day of November 1971 at 10 o'clock A.M. to testify before the Grand Jury and bring with you the records of the checking accounts, both special and regular, maintained by the Unitarian Universalist Association, Inc., and Beacon Press, Inc., 25 Beacon Street, Boston, Massachusetts from June 1, 1971 through October 15, 1971, such records to include, but not limited to, all deposits and withdrawals

during the aforementioned period of time, and copies of all deposit slips and checks drawn on each account, and items deposited, in the amounts of \$10,000 and above.

This subpoena is issued on application of the United States.

Please report to: Richard E. Bachman, assistant U.S. Attorney, Chief, Criminal Division, Room 1107, P.O. & Courthouse Building, Boston, Mass.

Date, October 28, 1971.

MEMORANDUM AND ORDER DENYING MOTION
FOR FURTHER RELIEF

OCTOBER 29, 1971

(United States of America v. John Doe; in the matter of a grand jury subpoena served upon Leonard S. Rodberg)

By memorandum of decision and protective order issued October 4, 1971, the court prohibited a grand jury inquiry into the legislative acts of intervenor United States Senator Mke Gravel. by a motion for further relief the Senator seeks a further order requiring the government to list the names of prospective grand jury witnesses and to specify all questions to be asked each witness and moves that the court by a hearing in advance of a witness's appearance determine whether a witness has privileged information which may not be the subject of inquiry consistently with the Speech or Debate Clause of the Constitution of the United States, Art. I, § 6, cl. 1*. At a hearing on the motion counsel for the intervenor submitted that, unless further relief of the type requested is ordered, the court and the intervenor have no way of assuring that the court's pro-

*The intervenor filed a separate motion that he be furnished with a transcript of the grand jury proceedings to date. By separate order endorsed on the motion it was also denied.

tective order of October 4, 1971 is being observed and that questions which may arise during the grand jury proceedings regarding the applicability of the protective order will be properly decided. The court denied the motion from the bench and stated that this memorandum and order would subsequently be filed.

Intervenor's motion is denied on the following grounds: (a) The court has no reason to doubt that its protective order will be obeyed. At the hearing, government counsel stated that it would be. Attorneys are officers of the court on whose good faith the court customarily relies and there is no reason why an exception should be made in this case. (b) The court believes that its protective order issued October 4 is unambiguous. The purport of the order is explained at length in the memorandum accompanying it. (c) The relief sought by the intervenor in his motion for further relief would impede the grand jury's investigation. A balance must be struck between the intervenor's right not to be intimidated by the Executive by an inquiry into his legislative acts, *United States v. Johnson*, 1966 383 U.S. 169, 181, and the grand jury's right not to be hobbled by a daily dissection of its activities.

In connection with the court's staying the enforcement of subpoenas on witnesses Leonard Rodberg and Howard Webber, the court has today issued a supplemental protective order prohibiting for a ten-day period inquiry into Senator Gravel's arranging for publication of the so-called Pentagon Papers. At the hearing counsel for the intervenor urged that the same further relief be granted for the purpose of implementing any such supplemental protective order. For the same reasons the court also denies the intervenor's motion as applied to the supplemental protective order.

[United States District Court, District of Massachusetts,
E.B.D. No. 71-172-G. E.B.D. No. 71-209-G]

**Supplemental Protective Order,
October 29, 1971**

(United States of America versus John Doe, in the matter of a grand jury subpoena served upon Leonard S. Rodberg, in the matter of a grand jury subpoena served upon Howard Webber)

Garrity, J. In its memorandum of decision dated October 4, 1971 the court rejected the contention of the witness Rodberg and the intervenor Senator Gravel that private publication of the so-called Pentagon Papers may not be required into consistently with the Speech or Debate Clause of the Constitution of the United States, Art. I, § 6, cl. 1. However, the arguments urged on behalf of the witness and intervenor are substantial and by no means frivolous. In order that the intervenor's position may be preserved on appeal, the court orders that the following Supplemental Protective Order be entered and remain in effect for ten days: * *

No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct in arranging for the private publication of the Pentagon Papers nor about Dr. Leonard S. Rodberg's conduct in arranging for said publication to the extent that what he did was in his capacity as a member of the Senator's personal staff.

United States District Judge

** This period corresponds with the duration of the stays ordered on October 28, 1971 staying enforcement of subpoenas on witnesses Leonard Rodberg and Howard Webber on application of the intervenor.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331

UNITED STATES OF AMERICA

v.

JOHN DOE

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant

No. 71-1332

SAME,

v.

SAME

SAME

Before McEntee and Coffin, Circuit Judges

MEMORANDUM and ORDER

Entered October 29, 1971

Hearing having been held on Intervenor's motion for stay pending appeal from the district court's denial of his motion for further relief and, it appearing that: (1) the integrity of

the processes of a grand jury must not be lightly regarded; (2) the grand jury here convened is not restricted to investigation of the specific crimes described below; (3) the allegations of possible infringements of the rights of the Intervenor under Article I, Section 6, Clause 1, of the Constitution of the United States as well as allegations of violation of the doctrines of separation of powers, raise important issues of substance, the harm of any such alleged infringements being irreparable; (4) an expedited schedule for hearing appeals on related issues has been adopted, such hearing to be held on November 4, 1971, and it being contemplated that speedy disposition of these issues including those raised by the instant motion, may be forthcoming,

It Is Hereby Ordered that until further order of this court, the grand jury shall not pursue its inquiry into the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), or conspiracy to commit such offenses or to defraud the United States (18 U.S.C. § 371) insofar as these or any other crimes may relate to the so-called "Pentagon Papers," in whatever form. However, it shall be empowered to continue its investigation into any other crimes.

It is further ordered that the parties be excused from reproducing the records on appeals in appendix form, that appellants' brief is to be filed on or before five p.m., Monday, November 1, 1971, and that appellee's brief is to be filed on or before five p.m. Wednesday, November 3, 1971. It is further ordered that the parties are granted leave to file four copies of their briefs in reproduced form to comply with Rule 5(d) and that service of said briefs is to be made in hand.

By the Court:

/s/ Dana H. Gallup
Clerk

STIPULATION

November 5, 1971

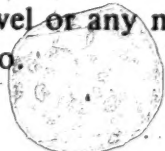
It is hereby stipulated between the parties hereto that until the termination of the restraining order entered by the United States Court of Appeals for the First Circuit on October 29, 1971, no representatives of the United States shall seek to obtain documents relating to the so-called "Pentagon Papers" within the District of Massachusetts for their own examination or for the use of a grand jury by the force or use of a subpoena.

/s/ Charles Louis Fishman
Counsel for Appellants

/s/ Warren P. Reese
Counsel for Appellees.

MOTION

The United States of America moves the court for an order modifying its order entered October 29, 1971, in cases Nos. 71-1331 and 71-1332, *United States v. John Doe - Mike Gravel United States Senator, Intervenor*, restraining the grand jury from pursuing its inquiry into crimes relating to the so-called "Pentagon Papers," to permit investigation by the grand jury into such crimes, provided that no witness shall be subpoenaed to appear or testify before the grand jury in the District of Massachusetts concerning the acquisition, use or publication of the "Pentagon Papers" by Senator Mike Gravel or any member of his staff, or any matter related thereto.



This motion is based on the attached affidavit of Warren P. Reese and the files and records of the case.

DATED: November 26, 1971.

Respectfully submitted,

JAMES N. GABRIEL
United States Attorney

/s/ Warren P. Reese
WARREN P. REESE
Assistant U. S. Attorney

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331.

UNITED STATES OF AMERICA,

v.

JOHN DOE

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

No. 71-1332 UNITED STATES OF AMERICA

v.

JOHN DOE,
MIKE GRAVEL, United States Senator,
Intervenor, Appellant

Before ALDRICH, Chief Judge
McENTEE and COFFIN, Circuit Judges.

MEMORANDUM and ORDER

Entered November 29, 1971

It is ordered that the grand jury may pursue its inquiry into crimes relating to the so-called Pentagon Papers, provided that neither Senator Mike Gravel nor any member of his staff or of the staff of the subcommittee on Buildings and Grounds shall be subpoenaed to testify, and no witness shall be questioned concerning the acquisition, use, publication, or republication of the Pentagon Papers by Senator Mike Gravel or by any member of the staff as above defined, until further order of this court. The restraining

order entered October 29, 1971 shall remain in full force in all other aspects until further order of this court.

By the Court:

/s/ Dana H. Gallup
Clerk

Enter:

/s/ Aldrich, Ch. J.

[Cert. cc: Clerk, U.S.D.C., Mass.;
cc: Messrs. Fishman, Reid, Reinstein
and Reese.]

App. 28

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331

UNITED STATES OF AMERICA

v.

JOHN DOE

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

No. 71-1332

SAME

v.

SAME

SAME

Before ALDRICH, Chief Judge,
McENTEE and COFFIN, Circuit Judges.

ORDER OF COURT

Entered January 18, 1972

Pursuant to opinion of instant date, the broad stay
granted on October 29, 1971, as modified, is hereby revoked

and there is substituted the order contained in the judgment of January 7, 1972 as clarified by the explanatory clause contained in our opinion defining

"actions" as "in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention."

The present order of revocation and substitution is stayed, until January 26, 1972.

The motion for clarification is otherwise denied.

The motion for reconsideration is denied.

By the Court:

/s/ Dana H. Gallup
Clerk

Enter: -

/s/ Aldrich, Ch. J.

[cc: Messrs. Fishman, Reid,
Reinstein and Nissen.]

VOLUME 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

EBD 71-172-G

JOHN DOE

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 2, Federal Building, Boston, Massachusetts, on Friday, August 27, 1971.

APPEARANCES:

Paul Vincent, Esq., and
John Marple, Esq.,
Attorneys, Department of Justice,
appeared for the government.

James Reif, Esq., and
Doris Peterson, Attorney,
appeared for Leonard Rodberg.

Robert Reinstein, Esq., and
Charles L. Fishman, Esq.,
appeared for Senator Mike Gravel.

[2]

PROCEEDINGS

THE CLERK: Emergency Business Docket Number 71-172, United States versus John Doe.

THE COURT: I see government counsel here, Mr. Vincent. Is there anyone with you representing the government?

MR. VINCENT: Yes, your Honor, my associate, John Marple.

THE COURT: Oh, yes. I see Mr. Marple. Now here is an application for a stay by Dr. Rodberg. Is he present?

DR. RODBERG: Yes, sir.

THE COURT: I see. And then counsel for Dr. Rodberg are Miss or Mrs. Peterson.

MISS PETERSON: Miss Peterson.

THE COURT: And Mr. Reif. Well, I simply have another matter scheduled, a hearing on a temporary restraining order, for eleven o'clock and I have not yet read these papers as carefully as I should, and would suggest a hearing at twelve o'clock, but I want especially to ask Mr. Vincent whether that is going to—

MR. VINCENT: That will be convenient, yes, your Honor.

THE COURT: —maybe create a problem. Will that be suitable, a hearing at twelve o'clock?

MR. VINCENT: Twelve o'clock will be fine, your Honor.

THE COURT: Well, we will have a hearing here at twelve o'clock. In this connection, before I picked up these papers this morning, a gentleman whom I see here in the court room [3] delivered to my chambers a letter addressed to me from the office of Senator Gravel. I was working on other matters when this letter came in, and I was unable to read it. I thought it might have to do with, if you will pardon the expression, an application for employment or something of that nature. I had not even picked up these papers at that point, and I just set it aside, but then I commenced reading this motion to quash the subpoena served on Dr. Rodberg and I have deduced, still without having opened the letter, that it must pertain to this matter.

MR. FISHMAN: That is correct, your Honor.

THE COURT: Now I would like, please, for you—because I don't see or haven't heard of your appearing for a party here—to state your name and also your interest.

MR. FISHMAN: If I may, my name is Charles Lewis Fishman. I reside at 63 East Capitol Street in Washington, D.C. I am the senator's private counsel, and a member of the bar of the District of Columbia, Superior Court, of the

District of Columbia, United States District Court for the District of Columbia, a member in good standing.

THE COURT: Well, I am happy to meet you and have you here. The question which comes to mind with respect to this communication which I have not yet opened is whether in your judgment it isn't the type of information that should be disclosed to [4] the parties to this matter simultaneously with disclosure to the Court. I am obviously reluctant to receive ex parte communications in any matter.

MR. FISHMAN: I have no objection to making the letter available to the government also. My instructions from the senator were to deliver the letter to you, since it states the limited purpose for which I appear.

THE COURT: Well, I am happy to have the letter, I am happy to receive it and will consider it, but on the condition that I have stated, that it be made available, or copies, not only to government counsel but to defense counsel as well.

MR. FISHMAN: I will be happy to do that, your Honor.

THE COURT: Well, on that understanding, between now and twelve o'clock I will read this communication which I have received, and I will look for you to attend the hearing if you wish.

MR. FISHMAN: At this point, your Honor, may I introduce cocounsel, Mr. Robert Reinstein of Philadelphia, the Temple University School of Law.

THE COURT: And does he represent Senator Gravel also as associate counsel?

MR. FISHMAN: Yes, your Honor.

MR. REINSTEIN: Yes, I do, your Honor.

THE COURT: And could you state Mr. Reinstein's bar affiliations?

[5] MR. REINSTEIN: I am a member of the bar of the Court of Appeals of Maryland, your Honor, and I am admitted to the Federal District Court of Maryland, United States Court of Appeals for the Fourth Circuit, and the United States Court of Claims.

THE COURT: And I take it that you are in good standing and that there are no disciplinary proceedings against you.

MR. REINSTEIN: That is correct, your Honor.

MR. FISHMAN: For the record, it is Reinstein, R-e-i-n-s-t-e-i-n.

THE COURT: All right. Thank you. Well, we will see you all at twelve o'clock, unless there is something additional to be mentioned at this time.

MR. REIF: Perhaps we ought to mention one thing, your Honor. That is that Miss Peterson and I are members of the bar of the state of New York and the United States Court of Appeals for the Second Circuit.

THE COURT: Members in good standing?

MR. REIF: Yes, sir.

THE COURT: And there are no disciplinary proceedings pending against either of you?

MR. REIF: No, your Honor.

THE COURT: That is true of you both. Well, I will welcome you all again at twelve o'clock.

MR. REIF: Thank you, your Honor.

[6] MR. VINCENT: Thank you, your Honor.

[The hearing was resumed at twelve o'clock noon.]

THE CLERK: Emergency Business Docket Number 71-172, United States versus John Doe.

THE COURT: I think it would be helpful again to have counsel state their names and the parties whom they represent. I have noted them but I don't know whether the stenographer did, and it should be done in connection with this hearing. So please, I will start again with Miss Peterson and Mr. Reif.

MR. REIF: Right. My name is James Reif, R-e-i-f, and I along with Miss Doris Peterson represent Dr. Leonard Rodberg.

THE COURT: All right. And I understand that Dr. Rodberg is seated at counsel table with you.

MR. REIF: That is correct, your Honor.

THE COURT: This gentleman here. Thank you. And then we have Mr. Vincent for the government, please.

MR. VINCENT: Yes, your Honor. My name is Paul C. Vincent, Attorney with the Department of Justice, Washington, D.C., and this is my colleague, Mr. Marple.

MR. MARPLE: John Marple, M-a-r-p-l-e.

THE COURT: Now I don't know whether Mr. Fishman wishes to appear or just be in the capacity of an observer at this juncture.

MR. FISHMAN: At this juncture, your Honor, my instructions [7] are simply to be present and observe the proceedings. Should the need arise, as indicated in the letter, I would then move to intervene. If you wish, I will enter the name in the record now.

THE COURT: It is strictly your option, Mr. Fishman. I am happy for you to do so or not, as you prefer.

MR. FISHMAN: Well, let me enter my name in the record now, your Honor.

THE COURT: Fine.

MR. FISHMAN: And hope that I won't have to proceed any further. My name is Charles Fishman, attorney in Washington, D.C. I am a member in good standing of the bar of the District of Columbia and accredited before the Superior Court of the District of Columbia, United States District Court for the District of Columbia, and the United States Court of Appeals, District of Columbia.

THE COURT: Whom do you represent?

MR. FISHMAN: I represent United States Senator Mike Gravel.

THE COURT: And your associate is Mr. Reinstein. Fine.

Well, I think at the outset I should mark as a hearing exhibit, Exhibit Number 1, Senator Gravel's letter to the Court dated August 26th, which you have shown to other counsel in the case, and that will be filed with the papers. The question I am considering at this juncture is whether to grant the petitioners' alternative request that they be afforded time [8] within which to file affidavits and mem-

Oranda of law. If that leave is granted, I would plan tentatively, that is, subject to the positions stated by counsel, to have the hearing following the one on the 10th of September, which has been scheduled with respect to the application of the witness Dr. Falk.

I think I might first ask Mr. Vincent whether such a postponement of resolution of the questions raised would handicap his presentation of this matter to the grand jury.

MR. VINCENT: If your Honor please, the government would oppose any stay, basically because I think a pattern is now being set by this. This is the second witness who has come in, or the third witness, petitioning for the same relief, and I think that these stays, your Honor, if the pattern continues, starting with the one last week, will unnecessarily impede and delay the investigation now being conducted by the grand jury.

I might note also, your Honor, that the issue here I think is so simple. It is to quash a subpoena. It has nothing to do yet with proceedings before the grand jury. This is merely an attempt to prevent an appearance. I believe, your Honor, that the proper forum for the determination of any of these questions must start inside the grand jury room. If there is any privilege to be claimed, whether it be the First Amendment, the Fourth Amendment, the Fifth Amendment, legislative privilege, as apparently is being done here, I do not think that briefs, affidavits, and memos of law can possibly anticipate particular [9] questions, and I think what would happen, your Honor, is, it would delay the proceedings indefinitely, witness after witness getting a stay, pushing this into the winter and the early part of next year, if the pattern continues. I am assuming that, your Honor. That is an assumption. Then we get into the grand jury room; if a question is asked and the privilege is taken, we would be back before your Honor on the very same point.

I believe, your Honor, that ad mimum the witness should and must appear before the grand jury for any intelligent determination as to whether or not any privilege claim is properly taken.

THE COURT: Well, now I will hear Mr. Reif.

MR. REIF: Thank you, your Honor. Addressing myself to Mr. Vincent's remarks, first of all, I am not familiar with any pattern to which he refers. We represent only Dr. Rodberg in this matter. I am familiar with Mr. Falk's position, and that is as far as we are familiar with the grand jury proceedings.

As to raising questions subsequent to appearance, it is our position that it is the appearance itself which should be avoided, not merely answering specific questions, so that we do not feel that appearing and declining to answer certain questions will in any way deal with that specific problem.

As to the particular matter in this motion, we raise at this time four questions, one of which is, as far as I know, [10] quite different from any of the points raised by Mr. Falk, and that is, I am specifically referring to the question of Dr. Rodberg's relationship with Senator Gravel. As to that question, I believe it raises substantial questions, as we have tried to show briefly in our moving papers, and I do believe that a memorandum of law would be quite helpful in resolving the issue.

As far as I can determine from what research I could do in the last day, the number of cases on the scope of the speech and debate clause is quite limited and the questions as to its scope are at this point quite undefined. I believe further that it will be necessary, in providing the Court with a precise notion of what claim it is that is before the Court, that an affidavit from Senator Gravel would be quite helpful in defining that relationship.

As to your Honor's suggestion as to September 10th, which I believe is two weeks from today, although I am forced to go to Maine next week for a few days, I do believe that we would be able to be prepared at that time, both with the affidavits and with the memorandum of law.

THE COURT: Let me ask you a question, Mr. Reif, about one aspect of the motion, and that has to do with the allegation that the subpoena and any questions that would be addressed to Dr. Rodberg in the grand jury would

be the product of an unlawful electronic surveillance. I have already ruled in the [11] first of these three cases to come before me, which had to do with the application of a witness named Popkin, that a bare allegation, in my opinion, of a violation of the laws dealing with wiretapping and electronic surveillance is insufficient to occasion an Alderman type hearing.

I see here a paragraph in Dr. Rodberg's affidavit about his information and belief that he has been the subject of unlawful electronic surveillance. If this ground of your motion is to be preserved, you will have to elaborate on that allegation at this time. I will follow the same procedure in this case as I did in this regard in the case dealing with Dr. Falk. His counsel elaborated on the allegation and outlined the type of evidence they anticipate producing, but in affidavit form. Papers in that matter I think are to be filed on the 8th of September. What do you have in mind, if anything?

MR. REIF: At this time, your Honor, we are not prepared to submit an affidavit which would show, say—

THE COURT: I don't mean an affidavit. What do you think you will establish, if anything, by way of unlawful electronic surveillance?

MR. REIF: At this point, your Honor, we are entirely uncertain as to that, and at this point it is substantially merely the allegation.

THE COURT: Well, do you know what if anything Dr. Rodberg had in mind in Paragraph 10 of his own affidavit when he says [12] on information and belief he had been the subject of unlawful electronic surveillance?

MR. REIF: Well, as I say, at this point it is a suspicion that we have based upon our knowledge as to certain people, with whom Dr. Rodberg has been in contact, but as to specific facts, we cannot point to any at this point.

THE COURT: Well, let me just make it a little clearer. What I am contemplating doing is restricting the stay, if I grant it, to a consideration of specific points, and I will exclude this allegation of unlawful electronic surveillance.

unless you have something that at least you are going to — unless you have something now in mind. I am not looking for proof now. I am just endeavoring to ascertain whether the allegation is not so much on information and belief but just a suspicion.

MR. RIEF: Well, I think, to be frank, that there is, as I say, no concrete fact which we can point to. Our belief is founded upon the fact that Dr. Rodberg has been in telephone communication with certain people and has used the phone of certain people whom we believe their phones have been—

THE COURT: Whom you suspect.

MR. REIF: Right. That is correct.

THE COURT: If you wish, you may talk to Dr. Rodberg right now to see if he has anything in mind specifically, because he says here in his affidavit, "Upon information and [13] belief, I have been the subject of unlawful electronic surveillance," so if he has, I would like to determine the extent of his information and belief if it is different from what you have just stated. So why don't you talk to him for a moment and see whether he has more in mind than you have stated.

MR. REIF: Thank you, your Honor.

[Counsel conferred with Dr. Rodberg.]

MR. REIF: Your Honor, at this time we have nothing beyond what I have just stated.

THE COURT: Well, the subpoena calls for Dr. Rodberg's appearance this morning before the grant jury, and I will, over the government's objections, grant a stay until after the hearing on September 10th. However, I do not grant the stay in order that there may be additional information filed with respect to unlawful electronic surveillance. That will not be the subject of the hearing on the 10th of September. Having no more than a mere general suspicion, that is not a proper basis for a stay of this subpoena, in my view, and that issue is eliminated from this application, and that is my ruling. I deny the motion for a stay to the extent that it is based upon a general, unspecified allegation of unlawful electronic surveillance.

I do, however, grant the motion in order that the parties may file affidavits and memoranda of law on the other points raised in the motion, that is, the First Amendment rights of [14] the prospective witness and the other First Amendment rights, and other rights, including any right of congressional privilege, which may be here involved. So that those other aspects of the motion are the basis for the Court's order, but only those aspects.

MR. REIF: Would your Honor entertain a brief argument on the surveillance question?

THE COURT: Well, I am aware, let me say, of the cases in the District of Columbia and in the Third Circuit and the California cases. I went into this in some detail in connection with the Poplin matter. Counsel furnished the Court with copies of the lengthy opinions in the Third Circuit and the District of Columbia cases, and I have read them, so if you think there is something that should be added to that, I will hear you briefly.

MR. REIF: Well, no. I was not aware that your Honor had been made aware of those opinions.

THE COURT: Yes. You see, this problem has been written about so comprehensively by the judges in the other circuits that I really made up my mind on the basis of studying those opinions.

MR. REIF: In light of that, I—

THE COURT: So I think that my ruling will stand on that aspect of it.

MR. REIF: All right.

[15] THE COURT: Now let me state why I feel that I should order this stay over the objections of Mr. Vincent. I believe that the grounds asserted in this motion are different from the grounds asserted in the applications heretofore filed on behalf of the witnesses Popkin and Falk, and that therefore, there is no real basis for believing that there is a sort of a pattern followed here, or sought to be followed, by the witnesses and by their attorneys. Mr. Reif apparently was unaware of these prior applications.

I think also that while the issue at the moment is simply the grand jury's right to compel the presence of the persons before the grand jury, the briefs that will be filed and the affidavits that will be filed and the argument made on September 10th will apply almost equally to questions that may arise during the course of the grand jury interrogation, so that I think it is best to get briefs from the parties at this juncture so as to be able to rule without protracted delay should disputes arise during the course of their testimony. So that it seems to me that time within which to brief these questions is positively required at some stage, and I would rather that these matters be briefed at this juncture rather than at some possible later time.

Please have in mind that the issue at the moment is the power of the grand jury merely to compel the presence of Dr. Rodberg before the grand jury, but in your briefs, please [16] cover the law, to the extent that you can find it, on the right of the grand jury to put to the witness the questions that you anticipate will be put. In other words, make your briefs somewhat broader than the narrow issue that is faced at this juncture. I assume that you had that in mind, in any event.

As far as the time is concerned, I think I ordered the briefs in the Falk matter to be filed on the 8th of September. I am not sure of that. It was either the 7th or the 8th. I believe it was the 8th.

MR. VINCENT: It was the 7th.

THE COURT: Was it the 7th?

MR. VINCENT: Yes, your Honor.

THE COURT: Well, here we will make it the 8th, because you won't have quite as much time, and this hearing will not be joined with the hearing on the Falk application, but it will follow immediately thereafter. There are separate questions. The Falk hearing is set for the 10th, at ten o'clock, and this would follow immediately thereafter, probably at 11 or 11:30, or whenever. So affidavits and briefs on the law in this matter are due on or before September 8th and the hearing will be on the 10th.

Now does anyone wish to be heard further? I will be with you in a moment, Mr. Fishman. But first, do counsel for either of the parties wish to be heard further or ask any—

[17] MR. VINCENT: I have no questions, nothing further, your Honor.

MR. REIF: We have nothing further, your Honor.

THE COURT: Well, now I think Mr. Fishman wished to address the Court.

MR. FISHMAN: If I may for just a moment, your Honor. We are obviously in a bit of a quandary here in the sense of determining what role we would want to play on the 8th. As the senator indicated to you in his letter—

THE COURT: Could I see that letter again, please?

[Exhibit handed to the Court.]

THE COURT: Thank you.

MR. FISHMAN: Particularly in the third and fourth paragraphs, if the purpose for which Mr. Rodberg has been subpoenaed involves violation of anyone of potential federal law, whether it be bank robbery or anything else, his interests are not involved and he would not wish to participate. If, on the other hand, the issues to be raised and decided at that hearing and before the grand jury related to his activities in the performance of his duties as a United States Senator and those of his personal entourage, he then obviously has a very substantial interest of his own which he wishes to assert.

The subpoena in this matter is totally devoid of any information to indicate the issue before the grand jury or the purpose or purposes for which they are calling Dr. [18] Rodberg. It therefore leaves us in the position where we are totally without any intimation at all to make a determination or even a guess as to whether or not we should be prepared to participate, and, if so, to what extent.

There apparently is some assumption on the part of counsel here that it may relate to these matters. I prefer not to engage in such guessing games, and I believe that as a matter of due process, the senator has a clear right

to know at this point, so that he may prepare and may make that decision, just what the issue is before the grand jury and what the general nature of the questions are going to relate to in terms of subject matter.

THE COURT: Well, it would seem to me, although this is for you and the senator to decide; that you will have to either— well, you will have to file some sort of motion in the case. You have got to file some sort of pleading directed to protect the interests of the senator which you described. I am happy to have you here as an observer, but I am not prepared to and will not rule on any requests or motions or other points that you raise unless they are based upon some sort of written application or some participation as a party.

I don't think this is a type of matter that invites participation of anyone that says he is an amicus curiae. You are here with a specific interest to protect. Perhaps you feel that it will be protected by counsel for Dr. Rodberg, [19] perhaps you don't, but I won't rule in the course of just discussing the problems or possibilities in general terms. You have got to decide whether to intervene or not, or whether to seek to intervene.

MR. FISHMAN: I might say, your Honor, that we were pained all day yesterday trying to ascertain just what our role should be, and I had several discussions with the senator at the time, and I go back to the problem that I suggested at the beginning of my remarks. If we should, for instance, move to intervene and then it is determined that the issue before the grand jury for which Dr. Rodberg has been subpoenaed has nothing to do with the senator, then we have no interest or right to be there. If, on the other hand, the questions for which the grand jury has subpoenaed Dr. Rodberg do relate to the senator's activities, then we want to be very vigorous in our representation.

I therefore find myself in a position where I am not sure which is the cart and which is the horse, to know which to put before the other, should I move to intervene at this point, which I have the papers before me to do if

necessary, and I am in the position of intervening before I know what I am intervening in.

THE COURT: Well, really, I cannot help you in the matter beyond what I have said. I will be happy to pass on anything that you decide to file, or to rule on motions or applications [20] of any sort, but it is up to you. And let me say this, or suggest this: that this is something you might wish to give further consideration to. I have already indicated that there are no final rulings in these matters to be made today. The Clerk's Office is happy to receive whatever you have, but I would think that you might give the matter further consideration. There is no compulsion on you, as I see it, to act or decide what to do today.

MR. FISHMAN: Well, except that, your Honor, if we do decide to intervene, would your Honor be disposed to rule and order the District Attorney, or the U. S. Attorney, rather, to disclose the purpose for which the grand jury has subpoenaed Dr. Rodberg, so at that point we can determine whether or not we wish to participate on the 8th?

THE COURT: That is not before me now. That is too iffy. You have got to make the first step here, either by intervening or not intervening, and when you have made up your mind, I will hear the matter.

MR. FISHMAN: In which case, your Honor, I will now move to intervene in the matter.

[Document tendered to the Court.]

THE COURT: Thank you. You have got to hand copies to—

[Documents tendered to counsel.]

THE COURT: Do you wish, Mr. Vincent, to be heard with respect to this motion to intervene?

[21] MR. VINCENT: Your Honor, the government objects to the motion to intervene, primarily on the grounds that the senator is not under subpoena, the grand jury has not called him as a witness before this grand jury. This motion is based on pure supposition that Senator Gravel — and I might say, through the eyes of any other senator,

any other Congressman — would intervene at will when any witness has testified before a grand jury. I say that the time for the senator to raise his privilege and protect his rights is when he is under subpoena if he is in fact ever under subpoena before this or any other grand jury.

I think here again, your Honor, that this is a motion made certainly in good faith, and, with all due respect to counsel for the senator, I do not think it is properly taken. The witness who is subpoenaed has alleged that he is a member of the staff of Senator Gravel. I notice that the senator uses the term that Mr. Rodberg is a personal servant of the senator. Now, if a senator or a congressman has the right in any case to intervene just because one, either his servant or his staff member has been issued a subpoena, I am afraid that we would definitely clog the wheels of justice in grand jury proceedings and in any court proceedings.

I think we need more than suspicion and conjecture that interests of Senator Gravel are involved.

THE COURT: Let me ask whether you have any authority on this proposition.

[22] MR. FISHMAN: Yes, I do, your Honor.

THE COURT: I am considering taking this motion for leave to intervene under advisement and looking at some cases myself. Have you had an opportunity to prepare any sort of memorandum in support of this motion?

MR. FISHMAN: Your Honor, I returned to Washington—

THE COURT: I can see that you haven't. Now query, I don't know whether I would take this— well, I am thinking that you might submit a brief memo of law on this point unless you have all the cases before you that you wish to rely on.

MR. FISHMAN: Well, if I may make a point or two, your Honor.

THE COURT: Yes.

MR. FISHMAN: The motion clearly lays forth the fact that the rights being asserted here are not those of Dr. Rodberg but those of the senator. The privileges which we

are asserting under the speech and debate clause are those of the senator as well as those of Dr. Rodberg. Indeed, I cite your Honor to Jefferson's Manual, which, of course, is the guiding light for interpretation of these matters, at Section 287, which deals with the privileges of members of Parliament, and it notes specifically there that the privilege extends to the member, that they are at all times exempt from questioning elsewhere for anything said in their own houses, and that during the time of privilege, neither a member, his staff, [23] nor his servants for any matter of their own may be arrested, and it goes on to point out other things, nor impleaded, cited, nor subpoenaed in any court. I will leave that to your Honor to take a look at. But it clearly delineates the distinction of the privilege between a senator or a member of the Congress and his servants. Each has the privilege, each to assert for himself.

[Book tendered to the Court.]

MR. FISHMAN: Also, in the case of *United States versus Johnson*, at 383 U.S. at page 173 through 177, the court notes there that in a criminal prosecution, that the evidence which the government introduced, which eventually was the reason that the court threw out the charges, because the evidence was protected by the speech and debate clause, extensive questioning concerning how much of the speech was written by Johnson himself, the congressman, how much by his administrative assistant, and how much by outsiders representing the loan company, and the court went on there to suggest that the pervasiveness of the questions with respect to both the congressman and his assistants, and his assistants, violated the speech and debate clause, so the right we are asserting here is clearly that of the senator. That right is not adequately protected, we maintain, by Mr. Rodberg or by the government.

THE COURT: Well, I am just not going to rule on this aspect of it at this time.

[24] I will hear Mr. Vincent briefly. I saw you half rise as if to respond, but I think that I wish to consider this matter further. I think that Mr. Fishman and associate counsel should file a brief memo in support of this right.

I think it would be helpful. I don't think you need until the 8th of September, however. When do you think you could have it in my hands, a memo discussing some of these principles to which you allude?

MR. FISHMAN: One moment, your Honor.

[Mr. Fishman conferred with Mr. Reinstein.]

MR. FISHMAN: One week, your Honor?

THE COURT: Well, let's see.

MR. FISHMAN: We are right back, of course, in the same box again.

THE COURT: Excuse me. What we will do is make it the same day, because I won't be here a week from today, so I won't see it before the 8th.

MR. FISHMAN: When will your Honor be leaving? Maybe we can get it to you before then.

THE COURT: On the second. In other words, the day before. However, I would need to see it— it would have to be filed on the first of September, Wednesday, for me to consider it, and at that it would have to be before two o'clock.

MR. FISHMAN: We will file it. We will make every attempt to file it before then, your Honor.

[25] THE COURT: All right. And I will take that aspect of this under advisement until then.

MR. VINCENT: If I may.

THE COURT: Yes.

MR. VINCENT: If I may, if your Honor please, does the government have the right to or do you desire the government to file a memo at the same time on September first before two o'clock?

THE COURT: Yes indeed.

MR. VINCENT: Even though we cannot reply directly to the citations and cases and law which will be in Mr. Fishman's brief, but the government will file an opposition, your Honor.

THE COURT: Fine. Yes.

MR. REIF: I should like to state for the record, your Honor, that Dr. Rodberg does not oppose the motion by

Senator Gravel. Actually we welcome it, and we think it will be helpful.

THE COURT: Well, I think— Yes, Mr. Fishman.

MR. FISHMAN: If I may raise one more point, your Honor, if it is possible for your Honor to hear argument on Wednesday, in the early afternoon or late morning.

THE COURT: Well, it would be possible, but I would rather read your cases than hear you talk about them, actually.

MR. FISHMAN: What I was thinking of, your Honor, is the need for some ruling so we could ascertain the purpose for [26] which the grand jury has called Dr. Rodberg, in time to prepare a second memo that your Honor has asked for for the eighth.

THE COURT: Well, I think they are distinguishable. The question of whether the senator can intervene is the one raised by this motion. If he is permitted to intervene, of course he will participate in the hearing through you, in the hearing on the tenth. You will have between the first and the tenth of September in which to prepare.

MR. FISHMAN: What I am suggesting, your Honor, is that preparing, as far as we are concerned, requires some knowledge as to the purpose and scope of the grand jury, which is not disclosed in the subpoena.

THE COURT: But there is a distinction. Let's assume you are permitted to intervene, hypothetically.

MR. FISHMAN: Yes, your Honor.

THE COURT: You then seek a court order requiring the government to, let's say, outline the subject matters of the grand jury interrogation, but the fact that you seek it is no different from the request of the witness here, that is, the prospective witness, Dr. Rodberg; he is seeking the same thing. So that issue is going to be considered on the tenth, whether it is sought on behalf of your client or on behalf of the witness. That is one of the principal points raised by Mr. Reif and Miss Peterson in their motion.

So I surely will not previous to the 10th of September order the government to make any specification of what

the subject matters will be. That is going to be one of the questions debated on the 10th of September, whether the Court should enter such an order, so you won't get that, in any eventuality, until the 10th of September.

Perhaps there are still some matters that are not a hundred percent clear, but that may be in the nature of the problem.

We will recess in this case at this time.

[Thereupon the hearing was concluded.]

VOLUME 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)

v.)

JOHN DOE)

EBD 71-172-G

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 2, Federal Building, Boston, Massachusetts, on Friday, September 10, 1971.

APPEARANCES:

Paul Vincent, Esq., Attorney,
Department of Justice,
appeared for the government.

James Reif, Esq.,
Doris Peterson, Attorney, and
Martin Stavis, Esq.,
appeared for Leonard Rodberg.

Joseph Bartlett, Esq.,
Herbert Reid, Esq.,
Robert Reinstein, Esq., and
Charles Fishman, Esq.,
appeared for Senator Mike Gravel.

[2] PROCEEDINGS

THE CLERK: Emergency Business Docket No. 71-172,
United States Versus John Doe.

THE COURT: The Court will take under advisement the motion filed on behalf of Professor Falk, and I will reserve decision on that at least until after hearing the arguments in this matter, perhaps over the weekend.

I will ask, please, that counsel begin this hearing similarly as did counsel in the prior hearing, by identifying themselves and associates seated at counsel table with them for the purposes of the record.

Yes.

MR. BARTLETT: If your Honor please, my name is Joseph Bartlett. I am a member of the law firm of Ely, Bartlett, Brown and Proctor, in Boston, Massachusetts. I act on behalf of Senator Mike Gravel in the matter as local counsel.

Reading from my left, Senator Mike Gravel, Senator from Alaska; Professor Herbert Reid, a member of the bar of the Commonwealth of Massachusetts, Professor of Law at Rutgers; Professor Robert Reinstein, a member of the Maryland Bar; and to my immediate right, Attorney Charles Fishman, of the District of Columbia Bar. Prof. Reinstein and Prof. Reed will be arguing the matter on behalf of our client, your Honor.

THE COURT: Well, will they both argue for the same client or—

[3] MR. BARTLETT: With your Honor's permission, I would like Prof. Reinstein to explain.

THE COURT: All right.

PROF. REINSTEIN: Our intention, your Honor, is that I would make the initial argument and Prof. Reed will give the rebuttal argument.

THE COURT: Are there any other counsel?

MR. REIF: Your Honor, my name is James Reif, and along with Doris Peterson and Martin Stavis, we represent Dr. Leonard Rodberg in the matter. At a previous hearing, your Honor granted leave for us to present Martin Stavis ad hoc. He is a member of the bar of the states of New York and New Jersey and the Supreme Court of the United States. He is a member in good standing of those bars, and there are no disciplinary proceedings pending against him.

THE COURT: What is his name?

MR. REIF: Martin Stavis. He will be here shortly.

THE COURT: And then will you please do it again for the government.

MR. VINCENT: Yes, your Honor. Paul Vincent, Department of Justice, Washington, D.C. My colleague is John Marple, also of the Department of Justice.

THE COURT: All right. I think first—will it be Mr. Reif who will be speaking on behalf of Dr. Rodberg?

MR. REIF: Your Honor, it is our intention that I will [4] argue in chief and Mr. Stavis will handle any rebuttal.

THE COURT: Well, being the moving party here, I think I should hear you on behalf of Dr. Rodberg before hearing counsel on behalf of the senator, because the senator is intervening here, you see.

MR. REIF: I understand that.

THE COURT: Unless you have a preference. If you have worked it out among yourselves, I am happy to abide by any order that you have agreed on.

MR. REIF: The attorneys for Senator Gravel have expressed preference in their going first, and we believe, in view of the fact that they raise primarily one issue before the Court, we raise the second and additional issue that they would be—in the best interests of efficiency that they proceed first.

THE COURT: Well, that is certainly agreeable, and I will hear counsel.

MR. VINCENT: If your Honor please, before counsel begins, I would like to hand up some papers to the Court and give copies to opposing counsel.

THE COURT: All right.

MR. VINCENT: The first document, your Honor, is the government's written opposition to the intervenor's motion to quash the subpoena. The second document is a certification from the Financial Clerk of the United States Senate. The third item, your Honor, is an extract from Public Law 601.

[5] (Documents tendered)

THE COURT: All right.

MR. REINSTEIN: Your Honor, at this time we have filed with the clerk two affidavits, one of Senator Gravel and one of Robert G. Dunphy, who is Sergeant at Arms of

the United States Senate, both of these affidavits testifying to the employer-employee relationship of Senator Gravel and Dr. Rodberg. Copies have heretofore been given to Mr. Vincent.

THE COURT: All right. I am happy to receive all of those papers.

MR. REINSTEIN: May it please the Court. Senator Gravel has intervened in this proceeding in order to protect his constitutional rights under the speech and debate clause. We filed a motion to quash the subpoena to Dr. Rodberg on the basic ground that any interrogation by the federal grand jury of a personal staff assistant of a member of Congress which inquires into the legitimacy of the official conduct of that member is unconstitutional and prohibited by the speech and debate clause.

THE COURT: Excuse me, right at the very outset. Let me get one thing clear. I wasn't absolutely clear from the briefs and so forth whether Prof. or Dr. Rodberg was a member of the senator's personal staff or a member of the staff of a subcommittee.

MR. REINSTEIN: Your Honor, Dr. Rodberg is a member of the [6] personal staff of Senator Gravel.

THE COURT: All right.

MR. REINSTEIN: Dr. Rodberg's affidavit has already testified towards that. We filed Senator Gravel's affidavit in which Senator Gravel deposes and says: "That Dr. Leonard Rodberg is and has been since June 29, 1971 a member of my personal staff in the United States Senate."

THE COURT: All right.

MR. REINSTEIN: The affidavit of the Sergeant at Arms or the United States Senate, Mr. Dunphy, says: "By letter to me dated June 29, 1971, Senator Gravel designated Dr. Leonard Rodberg as a member of his personal staff." Mr. Dunphy then goes on to quote the letter from Senator Gravel.

THE COURT: Well, thank you. What was on the 29th of June? Was that the day before, the day after, or the evening of, or do you know, what, the senator's quoting from the so-called Pentagon Papers?

MR. REINSTEIN: The letter was sent on the same day. It was many hours prior to the senator's disclosing the Pentagon papers at a subcommittee hearing.

THE COURT: All right. Thank you.

MR. REINSTEIN: That was also on June 29th.

There are, your Honor, we think, two basic facts which really can't be disputed in this proceeding, and those facts form the basis of our contentions here. The first fact is [7] Dr. Rodberg is a personal assistant to Senator Gravel. We have supported that in Dr. Rodberg's affidavit, the affidavit of Senator Gravel, and the affidavit of the record keeper of the United States Senate, the Sergeant at Arms, Mr. Dunphy. We see for the first time a notation on the letter from the Financial Clerk of the United States Senate claiming that "The above listed individual is not employed on the rolls of the Senate."

With due respect—of course, putting to one side the fact that this letter is not in affidavit form—with due respect, the Sergeant at Arms and not the Financial Clerk is the official record keeper of the United States Senate, and it is clear that any financial conditions which the senator has with his personal staff are set by the senator himself and cannot be inquired into by the Senate itself, and especially by the judiciary. I suppose in essence what the government is claiming, if it wishes to dispute this fact, is that Senator Gravel comes here and is practically attempting to impose a fraud on this Court.

THE COURT: Well, let me say this, please: I haven't even seen the document you refer to, filed by the Clerk. Did you hand it up to me?

It must be here. It was just handed up.

MR. REINSTEIN: Your Honor, I have additional copies.

THE COURT: No. There is no need for another copy if it [8] is here.

Oh, yes. Mr. Dunphy's affidavit. Here is Senator Gravel's affidavit, and then for the government we have a letter from Deputy Assistant Attorney General Holtzman and an extract from the Public Law. I don't see the reply.

Oh, I am sorry. The reply is in the stamp.

MR. VINCENT: Yes, your Honor.

THE COURT: Oh, yes. And here is the stamp of the Financial Clerk. Well, at least I know to what you are referring, so please resume.

MR. REINSTEIN: Yes, your Honor. The only other point I would like to make is that when we filed our motion to intervene, we alleged in our motion that one of the bases for it is that Dr. Rodberg is a personal staff assistant of Sen Senator Gravel. That was not challenged at that time by the government. Instead, the government proceeded in its arguments upon the assumption that he was instead a staff assistant—

THE COURT: Let me say this at the very outset: The Court will proceed on the assumption and on the finding that Dr. Rodberg has since June 29th been a member of the personal staff of Senator Gravel, so that is that.

MR. REINSTEIN: Fine, your Honor. The second undisputed fact on the record of these proceedings is that the grand jury has called Dr. Rodberg in order to interrogate him about the legality of Senator Gravel's actions in disclosing to his [9] colleagues in the Senate and to his constituents the Pentagon Papers during the hearing of the subcommittee and subsequent thereto. This is undisputed because the government, first of all, has not denied it. In its brief, the government says it will neither affirm nor deny it.

The government then proceeds to make arguments which take up the bulk of its brief on the speech and debate clause points on the assumption that this allegation is indeed true.

The only statutes which the government has referred us to were in its brief in opposition to our motion to intervene, and those statutes are, of course, the so-called Espionage Act, which was used to indict Dr. Ellsberg with respect to the Pentagon Papers.

Not only is the fact that the grand jury intends to interrogate into the legitimacy of Senator Gravel's actions undis-

puted by the government; it is also uncontradicted in that sense, and that is the premise which forms the legal basis of all the government's arguments.

The basic argument of the government is that Senator Gravel himself can be subpoenaed by the federal grand jury and interrogated concerning what he did on June 29th in disclosing the Pentagon papers. This was also the legal premise underlying the opposition of the government to our motion to intervene, in which they said that Dr. Rodberg had adequate protection.

[10] Finally, I think it is not an exaggeration to say that the necessary message of the government's brief is that there is a strong possibility that the next subpoena will be issued to Senator Gravel himself. I say this because of the comments in the brief concerning Senator Gravel's so-called obligations as a citizen to cooperate with the grand jury and, if he has anything to hide, to exercise his Fifth Amendment privilege.

Given all of those arguments, I think that Justice Harlan's apt description of another case is applicable. On the basis of these undisputed facts, we do not see how it can be legally maintained that the disclosure of the Pentagon papers by Senator Gravel was not part of the official conduct of a member of Congress for which he is immune from any criminal proceedings and any judicial inquiry in criminal proceedings under the speech and debate clause.

THE COURT: Let me just interrupt to say, setting the question and framing the issues, I don't consider this as a subpoena directed to the senator. You say there is this possibility. Well, I just don't know one way or another about any such possibility of a subpoena being directed to Senator Gravel. There is certainly nothing in the record that would indicate that that is contemplated, beyond what you have mentioned. We have, however, before us this morning a particular motion with respect to a particular subpoena, so please focus on the subpoena to Dr. Rodberg. I know that there are many similar [11] factors and arguments involved, but I certainly cannot treat the matter as a motion to quash a possible subpoena directed to the senator.

MR. REINSTEIN: I am sorry, your Honor, if I didn't make our position clear. I was addressing myself to the subpoena towards Dr. Rodberg.

THE COURT: Right.

MR. REINSTEIN: It is our contention that one of the single undisputed facts is that not only was Dr. Rodberg Senator Gravel's staff assistant, but also that this subpoena is designed to interrogate Dr. Rodberg concerning official actions of Senator Gravel in disclosing the Pentagon papers. We are protecting Senator Gravel's privilege to be immune to judicial inquiry by the interrogation of a staff assistant.

THE COURT: Let me just ask one or two questions to narrow it even further. Suppose hypothetically that questions put to Dr. Rodberg had to do only with matters previous to June 29th. Suppose they related to events ending the 28th of June. Would your position be different in respect to those questions?

MR. REINSTEIN: Certainly, your Honor.

THE COURT: In other words, your position, if I understand it, relates to matters that happened on and after the 29th of June. Is that correct?

MR. REINSTEIN: Yes, your Honor. Our position is that [12] Dr. Rodberg has been a staff assistant of Senator Gravel since the 29th, and as a staff assistant he necessarily engaged with Senator Gravel in privileged communications, and that these matters cannot be inquired into by the federal grand jury.

THE COURT: Do you draw any distinction between the types of activities of Dr. Rodberg? And here it seems we have three types of activities: First, the senator's quoting from the papers and his placing them in the subcommittee file, and then, I gather from the affidavits and briefs, his arranging for their possible publication. I don't know quite how to characterize that last aspect of the matter, but it is implicit here in some of the papers or exhibits attached to affidavits that Dr. Rodberg may have negotiated with possible publishers of some other papers, or something of that nature.

Do you draw a distinction in your own mind between the applicability of the Senator's privilege to those three types of activities, or are they all on a similar footing as you see it?

MR. REINSTEIN: We think, your Honor, that they are all covered by the speech and debate clause, and that any actions of Dr. Rodberg which were taken at the direction of Senator Gravel and in assistance of Senator Gravel in those activities are therefore also privileged under the clause. We say that because the Supreme Court has emphasized from the beginning that the speech and debate clause is to be construed broadly. [13] It does not simply apply to a speech or debate on the floor of Congress.

As your Honor knows from the case law, as early as 1881, Kilberg versus Thompson, the Supreme Court held that the clause also covers resolutions, votes taken, actions done in committee, and, finally, the broadest category anything generally done in a session of one of the houses by its members in relation to the business before it.

Essentially what we have here, your Honor is a speech by the senator given in committee critical of executive conduct in foreign policy. The speech was given in order to inform his colleagues and his constituents of how this country became involved in a rather disastrous chapter of American foreign policy and what lessons could be drawn to terminate this involvement. It was all part and parcel of a continuing debate that has been going on in the Senate over the foreign policy of the United States, and in particular how to terminate the conflict in Indo-China.

We see no distinction at all between the committee hearing putting it in the record, and the subsequent republication, because all of those fit into the category of things which are generally done by a member of the house in relation to the business before it.

THE COURT: Please elaborate a little on what you mean by the subsequent publication, because I was reluctant to state what you believe to have been done. You can state as much or as little as you wish, but what do you

have in mind? We are talking about what, the arrangement with the publisher for publication, or what?

MR. REINSTEIN: Well, first, placing the Pentagon papers in the official record of the subcommittee.

THE COURT: That I am clear on. I am talking about this, what I call the third phase of the—

MR. REINSTEIN: And then arranging for the printing of the record of the subcommittee to be distributed to the public at large.

THE COURT: And this is not now through the Congressional Record obviously, it is through private publishers.

MR. REINSTEIN: Yes, your Honor, just as most of us, in this courtroom, of course, are on the mailing list of congressmen and very frequently we get mailings from congressmen which contain republication of speeches they made in Congress. It is the traditional method of disseminating what the congressman did.

Congressional Quarterly has very limited distribution, as does with all due respect to Senator Gravel, the record of the subcommittee. The Executive Branch makes what we consider to be a highly unusual suggestion in their brief that no privilege attaches to Senator Gravel and therefore, of course, no privilege attaches derivatively to Dr. Rodberg, because they [15] make an unsupported allegation in their brief that the committee hearing that was held was somewhat defective.

We think, your Honor, with all due respect, that this suggestion from the Executive cannot be entertained for three fundamental reasons: First of all, there has been no proof at all offered of any irregularity in the committee hearing. No resolution was taken by the main committee holding the hearing illegal. No resolution was introduced, no resolution was passed by the Senate doing so. Furthermore, the only action that I know of that occurred in the Senate, if this Court is going outside the door, is that Senator Dole, who is, incidentally Chairman of the Republican National Committee, moved that an investigation be held of Senator Gravel's subcommittee hearing, with the possibility

of censure or other disciplinary action, and that this motion failed for want of a second so far as the Senate is concerned.

THE COURT: Well, before you leave that, I would like to turn—I thought there was a somewhat broader statement made in the government's brief on that. I thought there was some reference to the action of the subcommittee being in some fashion disavowed by the Senate, something along that line.

MR. REINSTEIN: That has never occurred. There is no proof in this record that it did.

THE COURT: Well, maybe that isn't what was stated; but there is something here along those lines, and I would like to know what it was if you can put your finger on it.

MR. REINSTEIN: Perhaps your Honor is referring to page 10 of the government's brief.

THE COURT: Well, let's see. Yes, it was at the very bottom of the page. It says the Senate has disclaimed official sanction for this action. I wondered what the nature of this disclaimer was.

MR. REINSTEIN: Your Honor, I know of no disclaimer. I can say with absolute reliability on this statement that the main committee issued no disclaimer of Senator Gravel's action and the Senate itself has taken no action against him. All I can see here in reference to it is a clipping from the Washington Post of August 18th, which I believe referred to the comment, the alleged comment, of the senator that he was dissatisfied with what Senator Gravel did.

THE COURT: All right. Well, please resume.

MR. REINSTEIN: Yes. Secondly, your Honor, even if the hearing itself were somehow illegal, we think the case law makes clear that this would not defeat the congressional privilege. In the Kilbourne case itself, the Supreme Court found that the hearing and the resolution of the congressional committee were not only illegal, they were without jurisdiction, they were unconstitutional. Nevertheless, the Supreme Court held that the congressional privilege means what it says. Similarly, in Tenney against Brantove, you have a situation of [17] unconstitutional action taken by

the committee, and those members were also held in—The same is true of Dombrowski and Eastland, and Powell versus McCormack. Those are the only four cases to come up to the Supreme Court in the context of committee hearings.

In each case, there was a finding of illegality of the hearing or the action taken by the committee, and in each case the senators were found immune. Obviously the immunity provisions would mean nothing if they only applied to illegal acts.

Thirdly, your Honor, even if the subcommittee hearing were viewed in the worst possible light, and that is an unofficial press conference, we think the Supreme Court has made clear that that too would be covered by the congressional privilege. We think this is settled by the two cases of Barr versus Matteo and Howard versus Lyons. As your Honor will recall, those cases involve subordinate officials of the Executive Department issuing press releases in one case and in another case, the Howard case, circulating those released and republishing them, and these press releases defamed certain friends of the official, and in one case their names were referred to Senator Joseph McCarthy for possible action.

The Supreme Court held that communications of that sort in the form of press releases to the public and to Congress itself was part of the official duty of subordinate officials [18] in the Executive Department. That being settled, surely if Mr. Barr and Captain Howard, only a captain in the United States Navy, had an executive privilege, which is judicially created and not even set out in Article II of the Constitution for the issuance of press releases, it seems clear that a United States senator, one of whose primary obligations is to communicate with his constituents and his colleagues over matters of national concern, must have the identical privilege.

THE COURT: I am not sure that that, though, is directly on point with what we are considering in this motion. Would you think that a grand jury could not have inquired into the activities of the Employees of the executive who

made these critical statements? In other words, we are going beyond that. We are not concerned here with whether there was a privilege that could be invoked in a civil action or in defense of a criminal case, but whether persons can prevent a grand jury from inquiring about it. What would you say if there had been a grand jury convened and it sought to learn the circumstances of the statements that were made by those two employees of the Executive? Do you think a grand jury could properly look into the matter?

MR. REINSTEIN: Well, your Honor, it probably could, but not in a way that is relevant to this.

THE COURT: Well, in other words—

MR. REINSTEIN: Executive privilege itself is not in the [19] constitution. It has been judicially created to apply to civil tort actions.

THE COURT: So really those cases aren't too helpful one way or the other.

MR. REINSTEIN: They are, your Honor, because we think they limit the scope of the privilege. It is true that in the context of certain deterring acts by individuals, that is, private torts, the executive privilege applies to, for example, press releases. The congressional privilege itself was peculiarly directed, as your Honor is aware from the *United States versus Johnson*, to criminal proceedings. The difference is, the Executive has no privilege to be free from criminal prosecutions. Indeed, the president himself can be impeached by the House of Representatives and tried by the Senate, and Congress at its will can eradicate either executive privilege or judicial privilege. For that reason, the Executive can be held to answer in the grand jury, but these cases nevertheless do delimit the scope of the privilege.

The only question then is in what cases is it applicable. We submit that if it applies to the Executive Branch, it applies to Congress.

Perhaps a closer analogy to your Honor's question would be the consistent position that has been taken by the Executive that it can disobey a request by Congress to appear and testify before Congress. This was first set out by Presi-

dent Jefferson in the early 1800's and has been followed since.

Furthermore, in the present day, for at least the last two and one half years, President Nixon has invoked this privilege on behalf of staff assistants and said they do not have to accede to the wishes of Congress and appear to testify. Indeed, staff assistants have refused to appear.

I think that is possibly the analogy we are drawing now, because the distinction is whether a coordinate branch of government can forcibly abridge a privilege when the Executive prosecutes itself. We have no such problem of separation of powers. The congressional privilege was peculiarly aimed at curbing the power of the Executive to institute grand jury proceedings.

THE COURT: I think we have agreed that there are some matters about which a grand jury could inquire of a member of the Senator's personal staff, such as things that happened before he became a member.

MR. REINSTEIN: Or bank robberies.

THE COURT: Or bank robberies. There is another example. So doesn't the privilege as asserted by Dr. Rodberg and by you on behalf of his employer, the senator, hinge on the subject matter of the questioning? And what we are dealing with here obviously is the mere appearance of Dr. Rodberg, and we would agree, as I understand it, that were questions to be confined to matters that happened previous to the 28th of June, then [21] there would be no objection, at least on behalf of the senator, if I understand your point correctly.

MR. REINSTEIN: That is right. Dr. Rodberg, of course, would have his own objections on the free speech ground and so forth.

THE COURT: Well, that is true, but I am talking now about this very special privilege which attaches to the senator's activities.

MR. REINSTEIN: That is right, your Honor.

THE COURT: So if that is the case, why don't you have to wait until you see what the questions put are?

MR. REINSTEIN: I think, Your Honor is suggesting that our motion to quash the subpoena is premature.

THE COURT: Well, that is no more than what the government suggested.

MR. REINSTEIN: I think our answer is, Senator Gravel has no right to be present in the grand jury room. Senator Gravel, in order to protect his privilege, must find out in advance what questions are to be asked. The decision of whether or not to ask the questions and whether or not to object has to come from Senator Gravel and not from Dr. Rodberg.

Indeed, your Honor, we think it would be clearly unconstitutional for the grand jury to inquire into the action of a United States Senator by breaching a constitutional privilege even if the staff assistant were willing to go along with it, [22] just as it breaches the attorney-client relationship for the grand jury to ask questions of the attorney regardless of whether or not he wishes to co-operate. Therefore, it is essential, for Senator Gravel to protect his own interests, that we know precisely what the scope of the inquiry is to be.

The problem on this record is there appears to be no dispute, and the government's entire legal argument is addressed to the proposition that the grand jury intends to investigate into the official conduct of a United States Senator, and we claim that is barred by the speech and debate clause.

Another factor which your Honor might consider is that the Executive Branch is coming to this Court and asking this Court to use its judicial powers to compel the appearances of Dr. Rodberg. Under the state of this record, we think that for this Court to do it may work unconstitutional ends and may put this Court in the position of being a party to the violation of the speech and debate clause. It seems to me that when a prima facie case of this sort has been made that a senator's aide is being interrogated, and the government not only refuses to deny that the questioning will relate to the legitimacy of the official actions of the senator but goes farther and argues the legal position that

it may do so, that this Court must first assure itself that no such questions will be asked, or else this Court may become a party to the violation of the Constitution.

[23] We think, your Honor, that this perhaps is clear by *United States v. Johnson*. Johnson did not just deal with the testimony of Congressman Johnson on the stand. Also called were his administrative assistant and his assistant, and they were interrogated as to how the congressman performed his official acts, initially, how a certain speech was prepared which the government claimed was the result of bribery.

The Supreme Court held that no testimony could be taken of not only Congressman Johnson in this respect but of his administrative assistant as well. Furthermore, the Supreme Court went further and said that the official acts of a member of Congress did not form the basis of even a charge of criminal liability.

A member of Congress does not have to be exposed to possible intimidation by a grand jury and possible violation of privilege communications between him and a staff member. If he were, he could not function adequately as a senator and fulfill his constitutional responsibilities. Every senator has to rely on his staff.

THE COURT: I am getting back to something I asked you about before, and that was the analogy that you drew to a congressman's sending newsletters back to his state, or congressional district, as the case may be, and you suggested that publication of the Pentagon papers would be analogous to that. Do you consider that, for example, every speech a [24] congressman may make, wherever it is made, is part also of his official responsibility? Is there any conduct on his part, that is, any speech on behalf of the congressman, which you consider to be outside the privilege?

MR. REINSTEIN: Well, if the congressman were speaking as purely a private citizen.

THE COURT: No. Let's suppose that he attends a fundraising dinner for a fellow congressman, which is a very frequent and customary practice, and he makes a

speech on a matter of public interest to the gathering. Do you think that that would be embraced by the privilege?

MR. REINSTEIN: Yes, your Honor. Yes, I do. The question is whether it is part of the ordinary duties and functions of a member of Congress. The reason we think Darby and Matteo case is so important is that the same question arose there, whether press releases communicating with the public were part of the official duties of a member of the Executive Department—a subordinate official, by the way. We think, your Honor, yes, the answer is a congressman has a high obligation to speak on matters of public concern to his constituents, and he cannot rely simply on the assumption that his constituents will perhaps find out about what he says on the floor of the Senate itself.

Since the beginning of this country, we have seen congressmen campaigning in their own districts. It is always [25] thought of as a virtue for a congressman to go back to his district and find out what his constituents think about important issues. There is a necessary colloquy between a congressman and his constituents. We think he would be violating his constitutional duty to his constituents if he did not inform his constituents of the workings of government and considerations of important policy. Otherwise they will be left in the dark as to how to exercise their franchise.

We think, your Honor, also that under the undisputed facts of this case, another reason why the subpoena should be quashed is the historical context in which it appears. The Supreme Court has emphasized in many cases that the prosecutions, the institutions of criminal proceedings, that is, by the Crown against members of Parliament who are critical of executive behavior, is the taproot of the speech and debate clause, and that this clause must be construed in any given case with this history in mind. Under the undisputed facts of this case, what we seem to have is the institution—or what we do have is the beginning of the institution of criminal proceedings. And the grand jury, of course, your Honor, I would like to emphasize is an arm

of the Judiciary which begins criminal proceedings. That is its function. Its function is to inquire into the legitimacy of an individual's conduct to decide whether or not an indictment should be issued against him. It differs in no respect, in that context, from testimony taken in court itself.

[26] In any event what we have here is the institution of criminal proceedings as a result of the disclosure by a member of Congress of material highly critical of Executive conduct in the field of foreign relations. I pointed out in my brief that one of the most notorious cases which led to a constitutional crisis in England almost exactly like this was when King Charles prosecuted Sir John Elliot and others who were critical of the War of the Seas. He said it was a violation of law and subversive and he pointed to certain statutes into which there should be inquiry. We think, your Honor, if history condemns those actions by King Charles, which led to the creation of legislative privilege, then it is unquestionable that the government could be permitted to turn its back on our constitutional heritage in this case.

Your Honor, I know I have taken quite a bit of time. If your Honor permits, I would like to comment very briefly on a couple of arguments the government makes, because I think this they have really turned upside down, and they have not addressed themselves to the terms of the speech and debate clause or to its historical origins or to policies underlying it. I say this because the government has cited cases and made the argument that the speech and debate clause was intended only to protect congressmen from civil arrest. It has talked about a completely separate cause, which is the privilege of congressmen to be free from civil arrest while they attend sessions of [27] the House. It is the clause preceding the speech and debate clause.

It has no conceivable relevancy, a congressman saying, "I cannot be prosecuted, because what the government intends to inquire into is the legitimacy of my official conduct." This is revealed by *Williamson versus United States*,

which the government places strong reliance on. In the first page of the opinion one Williamson was prosecuted for subornation of perjury in court in a large-scale land swindle. When the court was about to pronounce sentence he argued against the court passing sentence upon him, and especially to any sentence of imprisonment, on the grounds that thereby he would be deprived of his constitutional right to attend at and return from an ensuing session of Congress. They did not mention the speech and debate clause. The court said the question presented—this is at page 433—as to the scope and meaning of that article and section of the constitution relating to the privilege of immunity from arrest during their attendance on the session of the respective house, then going to and returning from the same.”

With all due respect I think the government’s argument would be analogous to arguing the history of the First Amendment by talking about the history of the Fifth Amendment. It just has no relationship.

It is true that that clause of the Constitution was [28] intended to bar private arrests; and it is also clear that the other clause, the speech and debate clause, was intended to bar criminal prosecutions of the official activities of members of Congress.

THE COURT: Let me ask this please: if there is any place in which you draw the line between situations which would be covered by the privilege and those which would not. Take, for example a member of the senator’s personal staff who had no discretion in matters but was just doing ministerial types of things, such as perhaps, well, a messenger or a driver perhaps, someone like that. Would you consider that this same privilege would apply to such employees?

MR. REINSTEIN: I think the question would have to be asked whether there is a confidential relationship between them if I may use an analogy.

THE COURT: That is what I am endeavoring to see, whether the Court in this type of matter considers types of

things done by Dr. Rodberg as a member of the senator's staff or if you consider a finding that he is a member of his staff automatically forestalls further inquiry.

MR. REINSTEIN: Your Honor, the question is, a finding, as I understand it, has been made that he is a personal staff assistant of Senator Gravel. The question is whether the grand jury will be inquiring into the official acts of Senator Gravel or of the acts of Dr. Rodberg in assistance to Senator Gravel. [29] In other words, whether the grand jury is attempting to pierce the confidential relationship between the two and, so to speak, go after Senator Gravel in much the same way it would call a wife to testify in an investigation into the legitimacy of her husband's actions, or an attorney to investigate the legitimacy of his client's actions.

The question would have to be asked whether or not the government is seeking to inquire into these official activities through this confidential relationship. It seems to us that Dr. Rodberg's affidavit and Senator Gravel's, in which allegations—in which they speak of Dr. Rodberg as being a personal member of the staff and acting under his direction and control, of necessity leads to the proposition that Dr. Rodberg is in much the same way, if I may suggest, as your Honor's law clerk is to you. Certainly an independent agent of Congress, such as the Sergeant at Arms, who acts like a policeman or a messenger boy who is not employed by the senator at all but is employed for one reason, and that is to deliver things, certainly would be another difference, like United States Marshals in this court.

That is why, your Honor, I think in order to give full protection to the congressional privilege, on the undisputed facts of this case the subpoena must be quashed. If the government intends to retreat from the position it has taken so far, I think, your Honor it must give a specification of the [30] precise questions to be asked of Dr. Rodberg so that Senator Gravel's constitutional rights will be adequately protected, and also so this Court does not give authority to unconstitutional violation. Since the

Executive has come to court for this Court's assistance, it is the obligation of Judiciary, under Marbury versus Madison, to make its own evaluation of the constitutionality.

If there are no further questions—

THE COURT: All right. Thank you. I will hear Mr. Reif.

MR. REIF: May it please the Court. I would like at the outset to define as narrowly as possible what we conceive to be the issue in this rather extraordinary, impressive case.

I would suggest at the outset that it is not, as the government has addressed itself, the question of whether or not Senator Gravel or a personal staff member of Senator Gravel, or anyone else, for that matter, can be prosecuted in connection with any activities conducted by or on behalf of Senator Gravel. The issue is more narrow than that. It is whether in fact a member of the personal staff of a senator of the United States may be compelled to appear in a secret proceeding to be questioned by the Executive Branch as to the conduct of that senator in the performance of his constitutional duties.

Your Honor has raised the question of whether publication of papers by the senator to his constituents can be considered within the scope of the speech and debate clause. I would [31] suggest that it is very much within the scope of the speech and debate clause, and I would refer your Honor's attention to the decision of the District Court of Columbia in Hentoff versus Ichord, which case indeed the government cites.

In that case, Judge Gesell says quite specifically the republication of the committee report is within the scope of legitimate legislative activity and is protected by the speech and debate clause. He rejects the arguments made by the plaintiffs in the case that it is somehow without the scope of the clause.

I would also call your Honor's attention to the fact that in his statement on June 29th, Senator Gravel made quite clear in this statement in the Record that everything he was doing in connection with the Pentagon papers he was

doing as a senator in furtherance of his constitutional responsibilities as a senator.

I tried to define the issue as I have at the outset because I do not believe the Government has addressed itself to that question. Rather, they have addressed themselves to the question of prosecution, and there is considerable discussion about the question of civil arrest, which refers entirely to a separate clause in the Constitution.

As Mr. Reinstein has indicated, it is undisputed that Dr. Rodberg is a member of the personal staff of Senator Gravel, and that the grand jury is inquiring into the activities of Senator [32] Gravel in connection with the Pentagon papers.

The Pentagon papers are not just ordinary documents or run-of-the-mill documents. They are documents which are highly critical of the Executive Branch. As has been discussed in newspapers and other written materials, they disclose a rather large degree of deception by the Executive Branch for several years and its revelations with respect to the war in Vietnam. For Senator Gravel to take the position that it is his constitutional duty to expose deception we submit is fundamentally the purpose of the speech and debate clause. As the Supreme Court made clear in *United States versus Johnson*, the purpose of the clause is not so much to protect against civil action by an individual, but rather to protect the Congress against hostile and retaliatory conduct on behalf of the Executive, and it is precisely that factual context which is before the Court.

We believe that analysis of two established privileges is helpful in resolving the issue here, and compels quashing of the subpoena. The privileges to which I refer are the attorney-client privilege and the husband-wife privilege, which have been established for many years within the law. These privileges were derived from the importance of maintaining the relationship between the two individuals involved in those cases. If one could be forced to testify against the other, it would result in destruction of the relationship, a relationship which is deemed by society to

be desirable, and consequently a common [33] law privilege arose which provides immunity from testifying, as by wife against husband and, conversely, in the same situation as attorney-client.

THE COURT: Well, excuse me, but I would rather talk about this particular case, because I don't think we have to go into the attorney-client and husband-wife privileges and so forth, although those are helpful analogies that have been mentioned. I would rather like to tell you something that bothers me a little bit about the situation, something I might well have asked before and didn't think to, but in rebuttal, counsel for the senator could speak about this if they wish.

Here is the New York Times case, and the New York Times case I think makes quite clear that there can be criminal prosecutions for the unauthorized possession of secret documents. There is surely nothing in the New York Times opinion that would make it seem legal to have done whatever was done by whoever possessed the Pentagon papers without authority. That is my starting point.

Now, here we have a situation where the Pentagon papers, comprising forty-six or forty-seven volumes, or however many they comprise, were not offered by the senator. He had nothing to do with their preparation originally, but only with their disclosure or only with their publication. I don't mean by the word publication just the printing, but I mean the quoting from them, publication in the broadest sense of the word.

[34] So assume, just for the sake of the point—because this is going to be litigated out in California—assume that there is a valid crime that can be committed with respect to publication of the Pentagon papers. I don't suppose that publications through a congressman, let's say, as a conduit would serve as a defense automatically. I don't say that is what was done in this case. I am speaking hypothetically.

Let's assume hypothetically that Prof. or Dr. Ellsberg obtained the Pentagon papers through the office of a congressman, though that is not what happened here. I don't

suppose that obtaining secret papers through a congressman's office would confer immunity on the person who obtained them thereby, and I don't expect you would disagree with the proposition. I am wondering where the distinctions are here. I am trying to see what was done here.

Go back to my hypothetical. Suppose Dr. Ellsberg, rather than a publishing house, had, in the first instance obtained the Pentagon papers through the office of any congressman. What would your view in that hypothetical situation be? Would you consider that this passing on would be a protected publication?

MR. REIF: I think it would very much depend upon circumstances surrounding how in fact the documents were transferred. If they were taken without the senator's or congressman's authorization, then I would take it there is no protection.

THE COURT: Well, I would assume that this was a congressman [35] who felt it was in the national interest to have the Pentagon papers widely read and studied, and who, out of a sense of duty and public interest, was the conduit for the distribution of the papers to a scholar such as Dr. Ellsberg what would you—

In other words, what I am trying to get at is whether transmission of previously created material, that is, the papers created by the authors thereof, is to be distinguished for some purpose from what a senator might himself create and author personally.

MR. REIF: I don't think there is any distinction there. I think the distinction between the hypothetical situation and the present case is that in that case, the transfer to a third or fourth person, however, is not a person who is in any way an aide of the senator nor acting in furtherance of the senator's express wishes.

I take it, for example, that at least in theory, anyone, who now comes into possession of the Pentagon papers through its distribution by whoever could conceivably be subject to prosecution under 793(e), I assume that to be the case, but these people and the person in the hypotheti-

cal are not personal staff aides of the senator, and I do not think really that we even have to get to the question of whether or not anyone can be prosecuted. The question is, How does the government go about getting the information for the prosecution? That is why I was interested before in the husband-wife privilege, because [36] I thought it was a direct analogy there.

If, for example, a husband commits a crime, he can be prosecuted for that crime but it does not follow that his wife can be compelled to testify about that in the grand jury. That is the point I am trying to make here.

We think that Senator Gravel and Dr. Rodberg and any other legislative aides are immune from prosecution, but we don't feel it is necessary to reach that question. All we are concerned about here is whether or not Dr. Rodberg, a personal staff member of Senator Gravel, can be forced to testify about that relationship. That is the only point that we have here.

The reason we feel that the relationship is so important between Senator Gravel and Dr. Rodberg—and, for that matter, between any senator and any personal staff member—is because—the Court will take judicial notice of the fact that senators and congressmen, and indeed any government official in high position relies heavily on the work of his personal staff to fulfill his own constitutional duties and obligations. Indeed, in the Barr versus Matteo case, the Supreme Court said specifically the magnitude of government activity has become so great that there must of necessity be delegation and redelegation of authority as to main functions. We think that is true as to obviously any government official particularly a United States Senator.

We feel, in light of the importance of maintaining that [37] working relationship between a senator and a close personal staff aide, the aide cannot be compelled to testify about the nature of that relationship. It is for that reason we believe Dr. Rodberg is privileged not to appear and testify to that.

Finally, on this particular point, I am somewhat surprised at the position the government has taken in their brief. The brief on behalf of the senator has mentioned there are several instances where the Executive has expressly refused to permit questioning by the Legislative Branch of an Executive official on the ground that it is somehow privileged, and in the illustration Dr. Kissinger was referred to. Furthermore, last week there was the question of the working report with respect to nuclear testing in Senator Gravel's own home state, which the Executive refused to turn over to the Legislature.

I also direct your Honor's attention to the case of United States Servicemen's fund versus Eastland, which is a case presently pending in the District Court for the District of Columbia, Civil Action 1474-70. That is a civil action brought by a private individual for the sole purpose of enjoining a subpoena issued by a legislative committee, and the defendants are Senator Eastland and Mr. Sourwine, who is the counsel to the subcommittee involved. It is not a suit for damages; it is simply a suit for injunctive relief against compliance with a subpoena and the government has opposed the taking of Mr. Sourwine's deposition.

[38] I have a brief signed by the Justice Department, in fact, by Mr. Monahan, who is head of the Internal Security Division, who takes the position in their own brief that without consent of the appropriate authorities in the Senate, Mr. Sourwine does not have to answer by means of deposition questions put to him in that lawsuit.

In this case not only has there been no authorization by Senator Gravel as to permitting Dr. Rodberg to testify; it has been quite the contrary, Senator Gravel has intervened and made quite clear his feeling that Dr. Rodberg should not be compelled to appear and testify as to the subject matter in question.

I believe in light of all we have said, in light of what Mr. Reinstein has said on the present state of the record, the subpoena must be quashed.

If your Honor has no further questions on the speech and debate clause issue I would like to proceed to the First Amendment issue.

THE COURT: Well please don't say everything that Mr. Levine said before. In other words, you have been here and heard the Court's colloquy with Mr. Levine on behalf of Dr. Falk. But hit the highlights, please, rather than repeat what he said to the extent that the arguments are the same. To the extent that they are different of course, you will have to speak separately to them.

[39] MR. REIF: At the outset, I would like to refer to two cases which were relied upon so heavily by the government because I think they have no bearing upon the present case. They referred to the Blair case for the proposition that the grand jury can compel all sorts of testimony from all sorts of people who have no right to decline on any grounds to furnish that evidence or those answers.

I think the Blair case does not at all stand for that proposition. It stands precisely for the proposition that a witness has no standing to question the constitutionality of a statute that is being investigated. That is the sole holding of the Blair case. Furthermore, I would like to point out that subsequent to Blair there have been numerous cases in the Supreme Court and many lower Federal Courts which have recognized numerous exceptions to that general rule about compelling a witness to testify.

It is well established, for example, that the Fifth Amendment privilege against self-incrimination is protected, protection is afforded before the grand jury. There are numerous cases to that effect. I take it it is beyond question.

Furthermore, there is the Fourth Amendment, the Silverthorne case, decided one year after the Blair case, various statutory privileges with respect to electronic surveillance and with respect to Egan and Evans. Furthermore, there are privileges as to husband and wife and attorney-client, which is a common [40] law privilege. So it is not at all undisputed that a witness may not be compelled to answer

questions before a grand jury. That has been well established in a variety of circumstances.

I take it on the basis of numerous cases involving legislative investigations which are cited in our brief, there is also a defense that the appearance and the questioning would violate the First Amendment. With respect to the Kinoy case, I am kind of at a loss to explain this, but Miss Peterson, Mr. Stavis, and I were counsel in that case, and the sole question before the court was the admission by The U.S. Attorney in that case that the only question they wanted to put to Mr. Kinoy was as to the whereabouts of his daughter. That was the sole, immediate question they wanted to ask Mr. Canoy before the grand jury, and it was on that basis that the First Amendment claim with respect to a lawyer's First Amendment activities as a lawyer was denied, and instead, when Miss Canoy subsequently came forward, Mr. Kinoy never went before the grand jury in that case.

I think the importance of the factual situation in this case is the understanding of what a man like Dr. Rodberg does in his work as a scholar and as a consultant to various congressmen, not only as a personal staff assistant to Senator Gravel but to other congressmen, as we have set forth in the affidavit.

THE COURT: Let me say, he is further away from being a newsman, is he not, than was Prof. Falk. Prof. Falk has been [41] published very, very widely in magazines, books, et cetera. I gathered from the affidavits that Dr. Rodberg is not as much of a journalist as Prof. Falk. Is that a fair reading?

MR. REIF: It is true that Dr. Rodberg has not published as many books or articles as has Prof. Falk. However, Dr. Rodberg has in fact published numerous articles and given numerous speeches and lectures on his own, as was cited in the affidavit, by way of example, the chapter which he wrote in a book commissioned by Senator Kennedy on the

ABM. Dr. Rodberg is continuing work on various publications and has written numerous publications, although not as many as Dr. Falk.

THE COURT: Do you think of him as a journalist?

MR. REIF: I think he performs multiple roles. The lines between the roles are not always clearly drawn. He obtains information which he uses, then supplies expert advise, expert testimony, expert public writings on the subject, particularly the decision-making process with respect to the war in Vietnam.

THE COURT: Here is an obvious consideration here: We have all of us to be alert to the possibility of expanding this newsman's privilege to a point where it is unrecognizable and undefinable. I suggested before the writer for a weekly newspaper. Then you can go to a weekly magazine, a monthly magazine, and a quarterly magazine. Then you can go to a lecturer, a man who is on the lecture circuit and then you can expand it to a point where you cannot define it or apply it, [42] and query, whether Dr. Rodberg's activities are sufficiently close to those of a newsman to even fit under the general, broadest interpretation of a newsman's privilege to the extent that it exists.

MR. REIF: I agree with your Honor that there ought to be a standard clearly established as to the scope of First Amendment rights with respect to a grand jury. I do feel there is a need for that. I believe Dr. Rodberg falls within the proper standard. Dr. Rodberg, it is true, does not publish as much as Dr. Falk. He does, however, continually and has for several years published and written for public dissemination much on the war in Vietnam, and I would point out specifically the type of article Dr. Rodberg is involved in writing is not a general discussion of the war in Vietnam, not general material on that subject, but for the specific purpose of converting public opinion to a particular point of view with respect to the war.

The materials Dr. Rodberg has written and continues to write are for the purpose of slanting public opinion to oppose the present policies in Vietnam, and I think Dr. Rodberg and Prof. Falk in that regard have occupied a unique role in America in the last five or six years, because, as your Honor well knows, at the outset of the war, it was universally accepted in the country that the war was acceptable. Now there is opposition to the war, and one of the major reasons for that [43] is that scholars like Dr. Rodberg have contributed much to public information with respect to what is going on in the war, information which has been otherwise kept from the public by the Executive Branch. It is for that reason we do feel that Dr. Rodberg does fall within the permissible scope and proper scope of the First Amendment privilege.

We feel that there are two relationships which are threatened here by the proposed appearance of Dr. Rodberg. There is the relationship of Dr. Rodberg and people from whom he gets confidential information which it is not illegal necessarily to obtain, and there is the relationship between Dr. Rodberg and the people to whom he disseminates that information. He disseminates it directly to the public and he disseminates it directly on occasion on a consulting basis to numerous senators and congressmen, and we feel that both those relationships are threatened if Dr. Rodberg has to testify as to his area of expertise, how he got it, and what he did with respect to his work with respect to Senator Gravel and other senators.

We feel the public's interest and right to know is an interest not only in Dr. Rodberg. His continued ability to provide expertise and advice and information to the public is seriously threatened if he has to appear in the present context of this case. We feel on that basis the government has to take the burden. We don't feel it is an absolute position.

We recognize that there are numerous exceptions to testifying [44] before a grand jury, as for example, the

Fifth Amendment privilege. We are asking the government to come forward with some showing of why Dr. Rodberg should be forced to testify in the circumstances of this case. Before they do, we believe he does not have to appear.

Addressing myself to one final point on the question of appearance versus refusal to answer specific questions, I think the immunity from appearance in this case flows, one, from the existence of the privilege to decline to answer questions which would abridge First Amendment rights, and the government's failure to come forward and show whether Dr. Rodberg would be questioned as to anything else.

That was precisely the situation in Caldwell. The court first established the privilege and then said since the government has failed to come forward saying he will be questioned as to anything, there is no reason why he has to appear at all. We feel that failure of the government is apparent in this case as well, failing to have satisfied that condition.

THE COURT: I think we should take a forty-five minute recess. I don't want to put counsel under such pressure as to feel they have to argue without letting them have some lunch and speed it up for that reason, so we will recess until quarter before two.

[The luncheon recess was taken.]

[45]

AFTERNOON SESSION

(The hearing was resumed at 1:45 o'clock p.m.)

THE COURT: All right.

MR. VINCENT: May it please the Court. The movant in this instance, your Honor, has raised two basic points. The first is that he is immune from the service of a subpoena because of his legislative privilege. The second point is under the First Amendment.

In regard to the legislative privilege, I would like to say, your Honor, that Dr. Rodberg is either immune from service, either from his own position or derivatively from the position of Senator Gravel. The main authority relied on is the speech and debate clause of Article I, Section 6 of

the Constitution. That your Honor will find at Page 2 of the government's brief. I would like to point out, your Honor, that that clause in the Constitution states: "The senators and representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place."

Special note I think should be made, your Honor, that that clause is limited to senators and representatives. No reference of any sort is made to either servants or employees. The authority cited by Dr. Rodberg is contained in his brief in in [46] support of his motion to intervene - I'm sorry, the brief of Senator Gravel to intervene, and at Page 6 of that brief he cites from Jefferson's Manual, which is the unquestionable authority on legislative procedures, from Section 3 dealing with privilege.

Senator Gravel in his memo states that "Members of the legislature are at all times exempted from question elsewhere, for anything said in their own house; that during the time of privilege, neither a member himself, his wife, nor his servants may be arrested on mesne process, in any civil suit, nor impleaded, cited, or subpoenaed in any court." The citation is to Jefferson's Manual and Rules of the House of Representatives, and the senator's moving papers.

I have with me, your Honor, a copy of the Rules and Manual of the United States Senate, made in 1967, which also contains Jefferson's Manual in toto. In this Manual, the Section 3 on privileges appears at Page 382 and Page 383, and I have taken the liberty, your Honor, of reproducing copies of those two pages.

THE COURT: All right.

[Document tendered to the Court.]

MR. VINCENT: And I direct your Honor's attention to the second full paragraph on page 383, but before I read that, your Honor, I go back to the first sentence of Section 3 immediately preceding the portion quoted by

Senator Gravel. That first [47] sentence reads: "The privileges of members of Parliament" – you will note, your Honor, in his papers Senator Gravel said members of the legislature; Thomas Jefferson is speaking of Parliament at this point – "from small and obscure beginnings have been advancing for centuries with a firm, never-yielding pace."

Now we go to the paragraph I pointed out on page 383:

"It was probably from this view of the encroaching character of privilege that the framers of our Constitution, in their care to provide that the laws shall bind equally on all, and especially those who make them shall not exempt themselves from their operation, have only privileged Senators and Representatives themselves from the single act of arrest in all cases except treason, felony, and breach of the peace, during their attendance at the session of their respective houses, and in going to and returning from the same, and from being questioned in any other place for any speech or debate in either house." Citing the Constitution, Article 1, Section 6.

In light of the complete statement of Thomas Jefferson in his Manual, the government submits, your Honor, that the reliance of Senator Gravel and Dr. Rodberg is misplaced, in relying on that as authority for including servants and employees of members of Congress.

I would like now to look at the claim of Dr. Rodberg that his immunity is that of derivation from the immunity held by the [48] Senator. I believe, your Honor, that the law is very clear that senators are not immune from criminal process. We recall from the Constitution that immunity does not apply in cases of treason, felony, and breach of the peace. However, rather than being limited to only these two categories, the Supreme Court has held that these words refer to all criminal proceedings whatsoever.

This appears in Williamson versus United States, at 207 U.S. 425, at pages 445 and 446. In that case the defendant, who was a member of the House of Representatives, had been indicted, tried, and convicted for subornation of perjury. He claimed immunity under the speech and debate clause, the same as Senator Gravel and Dr. Rodberg.

The Supreme Court in rejecting this claim cited with approval Cushing's Treatise on the Elements of Law and Practice of Legislative Assemblies in the United States, which said, and I quote from the case, at page 445-46, "The terms treason, felony, and breach of the peace as used in our Constitution embrace all criminal cases and proceedings whatsoever."

I think that even the movants here will agree that a grand jury subpoena is in a criminal proceeding. The courts have consistently held that congressmen are subject to subpoenas issued to obtain their testimony in court proceedings. By those proceedings, I am referring to criminal proceedings. Mr. Justice Chase, as early as 1800, in the case of *United States versus [49] Cooper*, at 4 Dallas, held that a congressman was subject to a subpoena even if Congress was in session. This rule has been applied as recently as 1960 by Judge Weinfeld sitting in the Southern District of New York in the case of *United States versus Seeger*, and that is found at 180 Fed. Supp. 467. Both the Seeger case and the Cooper case are cited in the government's memorandum.

Now even assuming that immunity attaches to a senator, and I am only assuming it, it is only when he is engaged in the lawful pursuit of the duties within the scope of his legislative functions.

Now what are our facts in the instant case? A subcommittee meeting was called at midnight and certain documents, which Senator Gravel and Dr. Rodberg assume are the basis for this opinion, were read to members of the press and members of the subcommittee. I direct your Honor's attention to the extract from Public Law 601, which I have handed to the Court, which sets forth the composition of the Committee on Public Works. I have here, your Honor, a copy - I regret that I only have one; I will make it available to your Honor - a copy of the legislative calendar of the 92nd Congress dated as recently as August 16th this year. You will note that in this document, on page 3, in Subcommittee of Public Buildings and Grounds is a third,

a Subcommittee of the Committee on Public Works, with Senator Mike Gravel as Chairman.

[50] I also would point out to your Honor that on page 2 of this document there is reproduced the names and the roster of the professional staff, the senior professional staff, and the clerical staff. Dr. Rodberg's name does not appear in any of the staffs of the Senate.

THE COURT: Well, that is not what they say he was. They say he was a member of the Senator's personal staff, so there is no claim that he was a member of the committee staff.

MR. VINCENT: I only point that out, your Honor, because I think I have already shown that no employee of the Senate, whether it be of an individual senator, much less an individual senator, if he is a member of the Senate staff, has no privilege; a fortiori, a member of a personal staff of a senator certainly cannot have the privilege.

THE COURT: What do you make of the Johnson case?

MR. VINCENT: Which one, sir?

THE COURT: The Johnson case, involving the prosecution for the preparation of a speech that was said to be contrary to the speech and debate clause.

MR. VINCENT: Yes, your Honor. That is the case where a member of the House was indicted on seven counts of perjury and one of conspiracy, as I recall. The House member was convicted on all eight counts. When it got to the Circuit Court of Appeals, the Court of Appeals reversed the conspiracy count, upholding the - I am sorry, they sent the perjury counts back for a new trial, [51] and they dismissed the conspiracy count because evidence had been used from a speech made on the floor of the House by the defendant, Representative Johnson.

When it got to the Supreme Court, the Supreme Court reversed the Circuit Court on the conspiracy count, reinstating the count, and sent all eight counts back for a new trial, holding that the government could not use any evidence of the speech made on the floor of the House.

Now, your Honor, that certainly comes within the protection of the speech and debate clause.

THE COURT: But didn't it go beyond that and say that it couldn't use, for example, evidence of agents' activities or assistants' activities in connection with preparation of a speech? even if it were not the activity of Representative Johnson himself.

MR. VINCENT: That is correct, your Honor, in connection with a speech made on the floor of the House, which is specifically excepted from Article I, Section 6 of the Constitution.

THE COURT: I do, of course, recognize the distinction, but I was wondering what you thought of that case on the proposition that the senatorial or congressional privilege is not restricted to the congressman himself but extends also, under some circumstances, to aides of the congressman.

MR. VINCENT: I don't think the case does hold, your Honor, or stand for that principal. I don't think the issue was in [52] that case. It had to do with evidence used against the congressman himself, and I do not recall that the Supreme Court as part of its holdings and decision said that an employee of the House is immune and has the same immunity and privileges as the Representative or the Senator.

I think the case does highlight very, very clearly, your Honor, that congressmen are not immune from criminal process. This man was convicted of a criminal offense, so the immunity extended by that speech and debate clause is highly respected. It does not apply to criminal proceedings of any type.

Now if it cannot apply to criminal proceedings of a congressman, as I say, a fortiori, it cannot apply to criminal proceedings involving members of the staff.

Referring back again, your Honor, to the meeting of the subcommittee called by Senator Gravel, I notice that attached to the moving papers of Dr. Rodberg they very kindly attached a copy of an article from the Washington Post dated August 8, 1971, apparently in support of their motion,

and I call your Honor's attention to the paragraph at the bottom of column two of that article, which reads, the report made by Senator Gravel at that midnight subcommittee meeting on June 29th "has not been published because Chairman Jennings Randolph reportedly was so furious with Gravel for calling the unauthorized, nongermane subcommittee meeting that he refused to authorize payment of a stenographer or a public record."

[53] In regard to the nongermaneness of the subject matter, I direct your Honor's attention to the extract from Public Law 601, which sets forth in nine categories the subject matters covered by the Public Works Committee. I won't read all of them, since your Honor has a copy, but I notice that they are all restricted to either the improvement of rivers and harbors, navigation, bridges, Customs Houses, Federal Court Houses, government buildings within the District of Columbia, Rock Creek Park, the zoo, and the construction and maintenance of roads and post roads.

THE COURT: Let me just interject, please, that I am concerned here with the power and propriety of the executive and judicial branches of government in passing upon what is the proper or improper business of a particular subcommittee or committee or activity of a member of the Congress. You did cite in your brief somewhere a case, I think, to the effect that the courts may look into this matter, look into such matters, such as the authority of a congressional committee to take certain action or the authority of a member of Congress to do certain things. I haven't read the case, and I would appreciate it if you would tell me which one it is.

* MR. VINCENT: It is on page 10 of our memorandum, your Honor, and the landmark case is Marbury versus Madison. The cases have been consistent from that time on that the courts do have the right to inquire into and reject unauthorized [54] legislative activity. As I say, I don't recall those cases myself, but they are in our memorandum.

THE COURT: Well, that isn't the issue here, really. The question isn't whether the meeting of the subcommittee, let's say, was authorized or the subject matter of its meeting was in line with its authority from the parent committee; it is, I expect, whether the Court can inquire into that in this proceeding and whether any order of the Court could be based on any such inquiry. I have genuine doubts as to the power of the Court to rule upon the legality or authenticity or validity of this subcommittee meeting. That, it would seem, would be the power of Congress, I should think, and the power of the parent committee.

All I am really asking is that you elaborate on what you said already. You cited *Marbury versus Madison*. That I have read, of course, I read that sometime ago, but what about some of these other cases? Are they anything like this? Are there cases involving grand jury investigations or anything of similar nature?

MR. VINCENT: These are not grand jury investigation cases, as I recall, your Honor. The *Watkins* case, of course, is a contempt of Congress case. No, none of these, your Honor, deal with grand juries, but I have cited them for the principle that the courts have ruled under certain circumstances that congressmen have acted outside the legislative scope, and I cited it for two [55] reasons.

First let me answer your question as to the legislative purpose of the subcommittee meeting. I agree at least in part, your Honor, that the parent committee and the Senate itself, the parent body, certainly has the right and the authority to rule on whether or not a matter handled in a subcommittee is within a legislative purpose.

Now the contempt of Congress cases I think are an excellent anomaly, that you cannot sustain a prosecution for contempt of congress unless the courts find that the committee had a legislative purpose and was acting within its scope. That is one of the basic accompaniments, contempt of Congress, under Section 192 of the United States Code. As I say, your Honor, I cannot cite you chapter and verse in these cases, but I do know the rule is that the courts, the

judiciary, can rule on whether or not an act of a congressman is outside of the legislative function.

This point is more or less of an aside for these reasons: that the defense here is based on immunity, and I think we have shown your Honor that there is no immunity (a) to a congressman in a criminal proceeding, that is, to resisting a subpoena issued in a criminal proceeding, and (b) certainly not on a member of his staff or a member of his personal staff. There is absolutely no protection in the speech and debate clause under the decided cases and tradition in history, as Thomas Jefferson pointed out. The Constitution and the founders of [56] this country drafting the Constitution left it out, the portion about his family and his servants, because Parliament had been increasingly encroaching on its own power and bootstrapping itself or trying to bootstrap itself, and I think it is very important that we don't have immunity, and that is the defense of this case.

The second reason for citing the power of the judiciary to inquire into and rule is the fact that on the facts in this case, even assuming again *arguendo* that Senator Gravel and through him derivatively Dr. Rodberg had any immunity, the government's position is that they divested themselves of that immunity by taking the documents they refer to and which they believe and think and assume are involved in this proceeding, and had contracted for and negotiated for to be published by a private publisher, and I certainly, your Honor, think and urge that that is *ultra vires*, and even if they had privilege, which I certainly do not think they have under the law, that this takes them outside of even that privilege, and the Court certainly is entitled and capable of ruling on that.

THE COURT: What about the analogy that counsel made to sending newsletters to constituents and making speeches at public forums on issues of national concern?

MR. VINCENT: Well, I don't agree, your Honor, that a speech in a public forum grants immunity to a congressman. The Constitution certainly doesn't encompass that, and I don't know of any [57] immunity for a newsletter if it is

privately done. If it is authorized by the parent committee and/or by the Senate and it is printed by the Government Printing Office or government funds are used, then you might have a question, provided the newsletter, as I say, has been authorized by Congress, but there again I would have to know the particular facts.

I don't think that generically anyone can claim a privilege ipso facto of sending a newsletter out. It might have absolutely nothing to do with congressional purposes whatsoever. If there is any libel matter or slander, I am not too sure but what the author could not be sued.

THE COURT: With respect to the Senator's quoting from these papers at the subcommittee meeting, would you take the same position were this quoting done on the floor of the Senate itself?

MR. VINCENT: If the Senator had quoted anything on the floor of the Senate, I would say he has immunity.

THE COURT: Now suppose the reading were done at a committee meeting of the Senate, let's just say the Committee on Foreign Affairs. What would your position be in such a situation?

MR. VINCENT: I believe there he would have immunity, your Honor.

THE COURT: So that here it is critical, in your view, that this was done at a meeting of a subcommittee of the Committee on Public Works.

[58] MR. VINCENT: That is right, your Honor. As one of the facets. -

THE COURT: Well, I understand that you have other significant, with respect to -

MR. VINCENT: Yes. Right.

THE COURT: And it is your view that the time and place and room in the Capitol where this was done is significant, with respect to--

MR. VINCENT: I think it is highly significant, your Honor, yes, I do, just as I do the fact that the chairman of the full committee would not authorize payment of either a stenographer or the printing in the public record. In

other words, as I read this, your Honor, the act of Senator Gravel has been eschewed and disclaimed by the chairman of the full committee.

THE COURT: I never interpreted this copy of the newspaper article as being an adoption of everything that was said in it. I thought it was filed for a more limited purpose, but the Senator's counsel would doubtless comment on that aspect of it. I never understood that everything stated in these exhibits attached to the motion was submitted as proof of facts, of all of the facts therein stated.

MR. VINCENT: As I say, your Honor, ordinarily I realize that a newspaper article is hearsay, but since it has been attached as an exhibit by Dr. Rodberg, I certainly think that it is only fair that I should be able to refer to the contents [59] of the article.

THE COURT: Well, you certainly may.

MR. VINCENT: I am not saying, your Honor, that I know this to be a fact, I am not saying that the newspaper article--vouching it to be the complete truth of the facts stated, but I find it highly interesting that there was no refutation in the moving papers, there was no restriction, as I recall, on the use of the article.

Of course, if this were a trial and we were entitled to have live witnesses, it would be a simple matter to request or -- I am afraid to use the word -- subpoena the chairman of the full committee.

THE COURT: The articles were attached as exhibits to Paragraph 8 of the motion, which simply says that it is believed that the questions to be asked "will concern the allegation made in the newspaper articles attached hereto," so that -- Well, that is a minor point, but I do think I should note in passing that I don't necessarily consider everything that is stated in these articles as having been factual. That isn't the purpose for which they were offered.

MR. VINCENT: Even there, your Honor, the newspaper article is submitted specifically for the point to show that the Senator, through Dr. Rodberg, has negotiated a contract for outside publication of a document which certainly is

not within the purview of the Subcommittee on buildings and grounds. The case of Long v. [60] Ansel, which is also cited in our memorandum, in 69 Fed.2d, stands for that principle, that a congressman can divest himself of any privileges he holds by acting on the outside and going outside the legislature. As I interpret it from the cases, your Honor, the speech and debate clause is restricted to congressmen and senators themselves, not their employees, not their servants, and at most, to fall within its ambit, the congressman must be acting for a legislative purpose. I think all of the cases, your Honor, only some of which are cited in our brief, which hold that congressmen are not immune from criminal prosecution, certainly uphold that principle.

Unless your Honor has anything further, that is all I have on the legislative point, your Honor, because I think we have demonstrated that there is absolutely no immunity in Dr. Rodberg.

THE COURT: Well, I haven't read a number of the cases that have been mentioned. I am not going to rule on this matter this afternoon. I will be taking this under advisement. I do have a question on another aspect of this case, although I have forgotten whether Dr. Rodberg raised the electronic surveillance point.

MR. VINCENT: You have already ruled on that, your Honor.

THE COURT: I know that, but he did raise it, and what I have in mind is my having quoted or adopted Mr. Justice Douglas's language in the early cases. This is when we had the Popkin case, the MIT professor. There I am sure I was unaware that in [61] that case, there had been, at least according to Mr. Justice Douglas and the copy that I now have, a representation to the District Court that no wire taps of any kind had been used in the Russo case. Do you think that that representation was critical to Mr. Justice Douglas's decision?

MR. VINCENT: Not as I read that, your Honor, and bearing in mind, of course, that this is purely a denial of a

bail application, a denial of a stay pending appeal. There is nothing to do with the merits of the case whatsoever, and Justice Douglas, as I read the opinion, your Honor, was aware of this fact, and he then went on to say – the language I quoted previously and which I don't have in front of me, but there must be more than a mere suspicion, and I think he was giving, in my private opinion, a preview of what the law might be.

THE COURT: But when you cited that case to me last month, I do believe that you made no reference to the occurrence in the District Court that I refer to; that is, the government's having represented in the District Court that there had not been wire taps of any kind.

MR. VINCENT: You are absolutely correct, your Honor.

THE COURT: I was unaware of that aspect of the case when it was called to my attention before. At least, that is my memory.

MR. VINCENT: That is my fault, your Honor. I take the blame for it. That is my case. I was close to it, and I [62] apparently assumed that your Honor was aware of the Russo case because of the publicity it had received.

THE COURT: Well, I was indeed, but I never had seen Mr. Justice Douglas's short order on the stay, which was not entered until the 16th of August of this year, and it would seem to me that the government in that case made the very representation which it has resisted making in this case, and I should think that would be a difference between the two cases.

If you were counsel for the government in the Russo case, can you tell me, please, whether this representation, to the effect that there were no wiretaps used, was made as a result of court order, or was it just a voluntary representation?

MR. VINCENT: It certainly was not voluntary, your Honor, and it is strictly opposed to the policy and position taken by the Department of Justice. It was in effect –

THE COURT: What led up to the representation then? What is the background of the representation as to no wire taps in that case?

MR. VINCENT: Because I did not know the department policy, to be frank with you, your Honor.

THE COURT: But was it made under court order or just in the course of colloquy or argument?

MR. VINCENT: Well, it wasn't a direct order, but from the colloquy from the bench and between counsel for the witness and myself, it became very apparent that the judge might not follow [63] the law in the Ninth Circuit. The law in the Ninth Circuit is absolutely clear, and I thought the law was certainly sufficient, but this particular judge was indicating that he might not follow it.

THE COURT: Well, I was simply surprised to read in this copy that I got today for the first time that there had been a representation by the government in that case, and I am happy to learn the background.

MR. VINCENT: I take the blame, your Honor. It certainly was not intentional.

THE COURT: Well, have you something further now with respect to this matter?

MR. VINCENT: Not on the legislative immunity. On the point of the First Amendment, your Honor, I would just like to say that I don't want to reiterate all of my arguments in the Falk matter, but I certainly would like to point out that I believe that Dr. Rodberg stands on a much less solid footing than Dr. Falk in claiming a journalistic privilege under the Caldwell case, and I have heard nothing here or read nothing in the briefs submitted which would bring him under any rule of law under the First Amendment.

That is all I have, your Honor.

THE COURT: All right. Now we have rebuttal on behalf of the Senator.

MR. REID: May it please the Court.

[64] THE COURT: You are Professor Reid?

MR. REID: Yes. R-e-i-d.

I want to say by way of introduction that I don't intend to take much time. I think a great deal of his Honor's time has been taken in argument, and there is some question of whether or not it has been directed to the inquiries which

are raised, so briefly I would like to try to direct my attention to some of the several questions and inquiries which you have put throughout the morning and the various responses thereto.

I think it is important at the outset that we make - not only make but keep clear throughout this discussion the distinction flowing out of the speech and debate clause between confidential communications and judicial accountability, and at times we have said we recognize that but then the discussion has been interchangeable.

In terms, sir, of judicial accountability, there is a further question, judicial accountability in terms of balancing and protecting what kind of interests. The courts have not approached judicial accountability in terms of members of the House or members of the Senate in any absolute; it has been in terms of balancing the purpose of the legislative privilege as against the interest being affected.

Quite frequently it is difficult, and in some of the cases which were raised earlier this morning, the problem the Court is fighting is, Is its historical role to protect the rights of [65] the individual and the rights of the individual against arbitrary, capricious governmental action, and therefore, a collision between that function and the judicial overseeing of congressional conduct. I think, your Honor, that in terms of this clarity, the discussion in Powell is very helpful. I might say in passing that I have had some experience with the expansion of the speech and debate clause by being on the loose end of Dombrowski and Powell in terms of the speech and debate aspect, but there the court's power is very clear in terms of the interests being balanced and the limitation.

Briefly I would like to call your Honor's attention to United States versus Johnson, some language at 185, which deals with the specific problem that you addressed to counsel this morning, then again to government counsel. Nobody contends there is any absolute war growing out of the speech and debate clause as to the Senator or anyone else for criminal conduct. What is contended is that the operation of

the speech and debate clause, if there is a necessary nexus between the conduct and the legislative activity, there may then be a protection against criminal prosecution because of inability, one, to secure information, or two, to make him accountable for his conduct growing out of and a part of his legislative function, and that, of course, is what the court was talking about in Johnson. They sent it back and said he could be sent to jail under other circumstances and what have you, his account being bad.

[66] Now, your Honor, in terms of the accountability and lines that you were drawing this morning with my co-counsel in terms of the speech on the floor of the House and the Bar Association's meeting and beyond, I think that the problem is resolved by two considerations, the kind of interest which is being affected by the speech and the need for accountability, as well as its relationship to the legislative function, and obviously the legislative function is clearer where the speech is on the floor of the House; likewise when equally protected where it was in a committee hearing and committee activity and committee work.

In terms, then, I think it is material, highly material, in this situation that this activity involved occurred at a committee hearing. In terms of that aspect, your Honor, the Court is quite correct in its suggestion that it is improper and the Court is without authority to determine the propriety or impropriety, regularity or irregularity, of a subcommittee hearing.

In Powell the court goes even further. The court has in any other case no intervening into activities of the legislative branch, but even there, your Honor, there has been and continues to be a distinction between what the courts have referred to in a series of cases between internal management and external action. Of course, Marbury, that line of cases, when you got out of the legislative process, the finished product, the act that was resolved in the legislation, of course there is no [67] problem of judicial intervention and judicial review.

In terms of Powell, the exclusion from membership the court said was at the outer limits, but the court has reserved on the political question and other judicial terminology clearly a large group of activities on the part of the legislature which is beyond judicial scrutiny, regularity of votes, certification as to the voting, any number of problems.

We are not pressing that matter. Our not pressing it does not mean we concede the facts alleged by the government in terms of repudiation of Senator Gravel. We take the position, one, it is not the subject of judicial inquiry, and that is why we have not gone further into that matter. There has been no problem, there has not been any official act on the part of the Senator nor any repudiation on his part whatsoever, but I think the legal consideration here is the lack of power of the Court to inquire. That is, of course, a question of internal management, internal -

THE COURT: Well, we know that the courts make inquiry as to the scope and authenticity and credentials of committees in contempt of Congress cases and some other types of cases. It can be done.

MR. REID: But, your Honor, let's be clear, in terms of bringing into the picture the aid of the judiciary in the contempt cases, and that is where all those cases are, the question of whether or not the court would aid the legislature by [68] judicially imposed punishment as a result of contempt in the House, and at first the court would not put any limitation on congressional action that came quite late.

In order to protect the individual and balance the individual and the regularity of the legislative process, beginning, I think, with Thompson and subsequent cases, the courts for the first time imposed, as a protective shield, legislative purpose, regularity of meetings, and that kind of issue. In terms of what had been brought into question, that is the judicial question of contempt.

Now involved in that was not the activity of Congress and its prerogatives. Involved in those cases and contempt cases was whether judicial punishment ought to be imposed, and the court has refused to impose punishment without showing that it -

THE COURT: Let me ask you a question on some other aspects you touched on earlier. Is it not material, in your analysis, for the Court to consider the relationship between the legislative function of the subcommittee of the Committee on Public Works and the promulgation of these papers that related to the national security? Mr. Vincent has made the point that were this something done before the Committee on Foreign Affairs, he would consider it to be covered by the speech and debate clause, but he suggests that having been done before a subcommittee whose concern was far removed from public affairs, that the clause would not apply. What is your view on that [69] point made by Mr. Vincent?

MR. REID: Well, with a great deal of restraint, your Honor, my view is, he is in error.

THE COURT: Well, I don't think that surprises me. But why?

MR. REID: For a number of reasons, your Honor. The inquiry in the contempt cases was, of course, not the power of a particular committee to inquire, but what it had been authorized to inquire into. Even the legislative purpose there was one of authorization in order to call witnesses and testify, because you were balancing the private interest.

I think to go into the question here of the propriety or impropriety, legality or illegality, of this committee hearing in terms of appropriateness or inappropriateness, you have then sailed upon the sea of political thinking that the court warned against in Baker and Carr, and of course this has been involved ever since. The problem there would be one of germaneness.

Now, the question which the Senator raised was, of course, considered by him and others to have been highly germane to the Public Works Committee. Not only does this committee but a number of others have a great deal of activity in dealing with these particular problems, and it has, of course, the question of reordering those particular priorities. In order to do that, more and more other committees have gotten into the kind of expenditure, the kind of activ-

ity that we are engaged in, in the [70] foreign relations field and its impact on those particular programs. In fact, there have been some programs curtailed and affected.

THE COURT: My question really is; Is that consideration material to decision of this motion, in your view?

MR. REID: No, sir, and, as I say, I don't think the Court has power to inquire into it. The question is germaneness. But I want to merely point out that we are not contending that it was not germane, it was not the interest of this committee.

Your Honor, if I may say, the only reason I have gone into accountability is that I think it is important, but, I don't think we ought to lose sight of actually what is involved in the posture of this case at this particular time, and that is not judicial accountability of an agent or the Senator, but confidential communication. At this particular stage, the government wants to do nothing more than to inquire from an aide and representative of the Senator, in terms of conduct and activity between the two. We say that the confidential communication growing out of inherent privilege and speech and debate, and we don't have to get into the question now of judicial accountability for the eventual act, but that this communication cannot be breached in this manner, and the posture of the government at this particular point is simply that.

The privilege of attorney and client, husband and wife, is not merely the communication aspect. It makes the agency problem [71] material. As Professor Wigmore has said in his treatise in terms of the privilege, the lawyer-client privilege, that obviously agents are included, because if you pierce the veil, at that point you have destroyed the communication. Also, your Honor, this husband and wife privilege is such communication, and may embrace and quite frequently embraces knowledge which has been obtained prior to the marriage, so it is the question of relating back in order to preserve the confidential communication.

I think also, because it gets to the response counsel made this morning to questions your Honor put in terms of the

materiality of Mr. Rodberg's conduct the 29th, the day after or the day before, and of course, I think we can concede that where lack of interest in inquiry into his conduct before the 29th, as long as it is in the present posture of invading the communication, because we have no way of measuring the limitation nor the reason for employment, or what have you, you may have a different answer altogether when you get to the accountability stage, but in terms of invading the communication aspect, it is, I would think, highly relevant that the -

THE COURT: Well, I don't want, as you already have suggested, to reargue the whole matter, but do I understand you take a different position than Mr. Reinstein, who argued first, that the grand jury could not properly inquire into events previous to the 29th? I thought he conceded that there could properly [72] be such an inquiry. I just want to be clear if you take a different position.

MR. REID: I don't understand, your Honor, that I am taking a different position.

THE COURT: Well, maybe not.

MR. REID: I gather his response was in the context of accountability rather than in terms of the context of privileged communication, and I am saying because of the privileged communication that we feel its sole purpose here, and the government hasn't denied this, is to pierce the veil of communication. That is the posture, and -

THE COURT: Well -

MR. REID: Sir?

THE COURT: He said, and I asked him specifically, I think, suppose questions were put only with respect to his activities previous to the 29th of June. I think he said, "Well, then, of course, we would have no objection." I think you now say that you might or that you would have objection, if I understand you correctly.

MR. REID: Yes, your Honor.

THE COURT: All right. I don't say what you must -

MR. REID: I am not as sharp as I was. We had a lunch break in between.

THE COURT: Well, maybe during lunch — at least I remember. I am happy to realize that I remember what occurred before [73] lunch.

MR. REID: We have all been highly impressed by your Honor's memory.

In terms of the legislative function, sir, I think no hard and fast rule can be made there either in terms of the operation of the privilege. I think what we are trying to say is that what was accomplished in this case, including the three steps that you referred to this morning, offering material as the republication and discussion with publishers, I think what we are dealing with here, of course, is a committee record, committee testimony, and the promulgation of that. Of course, we don't have to go to any republication, especially those in the field of libel and slander, where the court has been inclined to limit the privilege in order to protect the individual from the injury occasioned by imposition of the privilege involved in Matteo and Bigelow and other cases, injury to a private individual because of not being able to get relief as a result of the operation of judicial privilege. Your Honor is, of course, quite familiar with the necessity of the confidential relationship and how that that could be pierced by inquiry into executive and legislative privilege.

May I say, sir, to conclude, our position, of course, is that the operation of the speech and debate clause is such as to preclude the appearance of Mr. Rodberg before the grand jury, and therefore the motion to quash ought to be granted because [74] of the confidential relationship as well as the operation of the privilege.

Further, if it appears, however, that the Court feels the objection is premature, the problem, of course, in terms of whether it is timely or not, whether substantial injury occurs for which there is no further redress, the problem in this case, unlike others, in the grand jury room we would have someone purporting to assert the privilege of the Senator and to protect the Senator or not to protect him, as he felt free. The Senator, of course, would not be present, and

the only way, if the Court agrees that there is this protection, that it can be guaranteed and preserved in this kind of situation is, of course, to prevent, one, the appearance altogether, and if not, certainly we ought to be in the same stage before he is ordered to appear that we are after the questions have been propounded so that the Court might direct itself not only to the area of response but the area of inquiry by the government.

I would like to say in passing, of course, I don't know the procedure in this circuit, where I am permitted to practice, but I have had some experience with the Justice Department in its expanded use of the grand jury to help it in its investigatory function, and the mere fact that the earlier communications involved in convening the special grand jury have been found, it does not follow that they are available to counsel or to the public.

[75] The convening documents and federal inquiry into the Fred Hampton death of 1969 in Chicago are to this day sealed, even the convening order, and the question that we have noticed by what is suggested in the convening papers does not follow, because usually, following the Attorney General's Manual, they are stated in such broad and general terms that you would not understand what it is about.

Thank you, your Honor.

THE COURT: Yes. It is Mr. Stavis?

MR. STAVIS: Yes, sir. If the Court please, I shall be the last to address the Court, I think. On behalf of the attorneys in this matter, I want to express our appreciation for the obvious patience and the interest the Court has had in this matter. Obviously these cases do present to the Court matters of enormous constitutional significance, and the concern of the Court is shown in dealing with and listening to the arguments, and we all appreciate it. I shall try to be very brief. I shall try not to duplicate specific points.

Directing our attention to the legislative immunity question, it is clear in the record that Dr. Rodberg's position is at the direct request of Senator Gravel. The first question which Mr. Vincent raises is whether the immunity extends

to members of the staff, and I suggest that Mr. Vincent seems - I would like to call to the attention of the Court a number of items: firstly, the brief submitted by the Department of Justice itself, [76] in which, on behalf of Mr. Sourwine, who is on Senator Eastland's staff, the Department of Justice said it is clear that the information sought from the defendant has been received by him pursuant to his official duties as a staff employee of the Senate. As such, the information is within the privilege of the senate.

So the shoe is on the other foot. The Department of Justice had no difficulty in conceiving that the speech and debate clause extended as well to staff employees of senators.

THE COURT: I didn't hear it quite completely. Was it staff employees of the Senator or the Senate?

MR. STAVIS: In that case it was a staff employee of a senate committee.

THE COURT: I see.

MR. STAVIS: It is quite clear that the speech and debate clause of the Constitution extends to the senator. It doesn't extend just to the Senate. It is very clear in its terms that it applies to the senator.

Secondly, the difficulty that Mr. Vincent has in extending this speech and debate clause to employees, he overlooks the fact that the question is, what are you going to ask the employee about? Obviously if Dr. Rodberg was to be inquired into with respect to some bank robbery that he may have witnessed, obviously the speech and debate clause doesn't extend to that, because that has nothing to do with his function with the Senate. In [77] fact, I suppose the Senator himself might be the subject of a subpoena with respect to an automobile accident that he saw at the corner. But if the issue, the subject of interrogation, concerns the speech and debate of the Senator, necessarily it extends to those who work with him on that speech and debate and when you are trying to reach the speech and debate through an employee.

I suppose if tomorrow I go to my office and interview a client and then do the dutiful thing of dictating to my secretary a memorandum of our conference, I don't suppose that the lawyer-client privilege can be just disregarded by a subpoena served on my secretary in which the grand jury would say, "And what did Mr. Stavis tell you that the client told him?" and that is what this is all about, because the guts of the inquiry is the speech and debate of the Senator.

Mr. Vincent spent a great deal of time saying senators are not immune from criminal responsibility. Of course, they are not. Nobody has even suggested that they are immune from criminal responsibility, but that doesn't happen to be what this case is about. The question is whether they are immune from being compelled to testify about a speech and debate, so any case which says that they are not immune from criminal responsibility is irrelevant.

Mr. Vincent says maybe the actions of subcommittee were beyond his power. Well, the Senate is a self-governing body. [78] It knows how to handle its own committees and subcommittees. It even has disciplinary power, and it really would be extraordinarily beyond the power of this Court, or any other court, for that matter, to step into that kind of question. I hear tell there is a good deal of contention between the Armed Service Committee and the Foreign Affairs Committee. Perish the thought that that question would be presented to this Court for adjudication to see whether or not each is staying within its bailiwick.

Mr. Vincent couldn't quite recall the case but he said there are some cases in the Supreme Court in which the Court says the Congress has to do its business pretty carefully if it expects us, the courts, to prosecute contempt of Congress. It has to delegate its power carefully. Resolutions on contempt must be careful, so on and so forth. Of course, the case is the Novak case, but the Novak case went a little further and said the only time we get concerned with how you run your business is when you come into this courtroom and ask us to prosecute somebody for something that he didn't do before a committee, but as

far as you do your own business and don't come into court to ask for our help, that is your affair. The court has no business intervening in the self-governing quality of the legislature.

Here the shoe is quite on the other foot, because the executive is now trying to move in against a senator and say, and we are telling you, we are telling you, in fact, we looked to [79] the court to make that decision for us, that he was acting outside his bailiwick. It would be a gross violation of the concept of separation of powers to do that.

Then we have the question of the loss of privilege, namely, it is all right to make a speech on the floor, to make it even in a committee, but if you start publishing speeches on the floor or in the committee, then you lose the privilege. Hentoff against Ichord, 318 Fed. Supp. 1175, at 1179, is directly to the contrary. There the legislative activities are not limited to speech or debate on the floor of Congress. Information in the report involves matters that concern the public, and the court will take no action which limits the use and individual congressmen is to make of the report or its contents on the floor of the Congress.

We are not talking about fund-raising speeches by congressmen. I am talking about the publication of a document which constituted a presentation which constituted the record of this subcommittee. I understand that the publication will be exclusively the record of the subcommittee. We cannot deal with the question of loss of privilege when that is the issue.

So much, it seems to me, needs to be said on the question of privilege, congressional speeches, and the debate privilege. I should like to spend just a few moments on the electronic surveillance question.

THE COURT: Well, now I am trying to think. Didn't I rule [80] on that?

MR. STAVIS: I don't—

THE COURT: Pardon?

MR. STAVIS: The matter is in our papers.

THE COURT: Oh, yes, I ruled on that at the hearing, and I cannot offhand recall whether you attended it or not, but this is on something that the -

MR. STAVIS: May I suggest -

THE COURT: What was it? Was it the first of - No, it was the 20th of August. I asked counsel for Dr. Rosenberg what he had, if anything, along the lines of the matter of an affidavit or other indication that there had been any electronic surveillance - this was Mr. Reif - and he said that because he had stated in his affidavit that on information and belief, there were questions that would be based on electronic surveillance, and correct me if I am wrong, but he said he had nothing except a suspicion, and therefore I ruled on that at that time. He can correct me if I am wrong. Isn't that what happened?

MR. STAVIS: May I respectfully address myself to your question?

THE COURT: But let me ask this: Were you present?

MR. STAVIS: I was not.

THE COURT: Well, why don't we -

MR. STAVIS: I will ask Mr. Reif to address himself to that.

[81] MR. VINCENT: If I may answer the question, you denied the motion in regard to electronic surveillance.

THE COURT: I think I did.

MR. VINCENT: You did, your Honor. Mr. Reif will bear me out on that.

MR. REIF: Your Honor, that is correct. You denied the stay on the question of surveillance. It is our understanding that you did so on the basis of Mr. Justice Douglas's opinion in Russo.

THE COURT: Yes. I am sure I did, so I am not going to reopen that aspect of it.

MR. STAVIS: I wouldn't want to tax the patience of the Court.

THE COURT: You see, I did not do that in Professor Falk's case because his lawyer spoke about getting some

affidavits and so forth. There was just a distinction in the way the cases were treated. And I have heard Mr. Homans too, originally. I have heard all that can be - I have read these cases.

MR. STAVIS: I don't want to tax the patience of the Court. I did simply want to say that it had been our view that when you denied the motion in that respect, it was without the knowledge that your Honor acquired today, namely, that Mr. Justice Douglas's denial of the stay to Mr. Russo was based on a representation made in the District Court by the representative of the Department of Justice, who happened to be Mr. Vincent.

[82] THE COURT: Well, that is right. I didn't know that at that time, but that was not really the basis. I explained my basis then, and I just used Justice Douglas's language. You might say that I agreed with Judge Gibbons in the Third Circuit if you want to find the reasons for my ruling. So that is a matter apart.

MR. STAVIS: May I therefore proceed to the last point.

THE COURT: Fine.

MR. STAVIS: Which is the First Amendment point. Mr. Vincent dismissed it rather casually with respect to Dr. Rodberg by saying, on this journalistic privilege Mr. Rodberg's case doesn't approach that of Dr. Falk, because he hasn't published very much. It seems to me that there is a rather basic misconception, at least in Mr. Vincent's formulation, as to what the privilege is.

The question of journalistic privilege is a First Amendment privilege, and to approach this in terms of "Do you work for a daily newspaper or a weekly newspaper or a monthly newspaper? Are you a regular? Are you full-time? Or are you whatever else it is called?" misses the whole thrust of what the Court itself recognized this morning was an emerging recognition of the singular role of the First Amendment in its relationship to some of these grand jury proceedings.

What I would like to suggest, your Honor, is that just as courts have recognized this emerging role, so must the

courts recognize the emergence in recent years of what amounts to a [83] new kind of profession, which I would like to call the scholar-communicator or the journalist-communicator. It is a development, your Honor, roughly since World War II. Scholars today do not live in the ivory tower or sit in the library publishing their findings only in learned journals that are read by their colleagues and then get lost. The scholar-communicator is the scholar who communicates to the public and contributes to the education of the public, as has indeed the journalist in our society:

That communication, your Honor, has been to the public and, as clearly noted in the affidavits of Dr. Rodberg as well as Professor Falk, these are communications to the legislative body, which is, after all, the center of the development of legislative policy in this country. It is fair to say that there has emerged a new professional identity.

Interestingly, your Honor, some of the individuals who function as the scholar-communicators function as individuals, but in large measure, some of their activities have become institutionalized in institutes, so that, for example, you find Dr. Rodberg, as the affidavit shows, is engaged by the Institute for Policy Studies; Dr. Falk is engaged by the Center for International Studies.

Creation of these institutes, which, incidentally, happen to enjoy tax exemption from the United States income tax laws, is itself a recognition of the public interest, the public [84] interest in the on-going, continuing role of the kind of scholarship and communication that these people engage in.

What is the reason for the emergence? And I suggested that this emergence has occurred only since the end of World War II, the reasons for the emergence of this new kind of professional identity. Largely, I think it reflects an enormous increase in executive power, particularly employed secretly, and for that reason the unique contribution of these scholar-communicators is that they have been

tearing away the veil of executive secrecy so as to inform the public and the legislators as to what is happening.

THE COURT: Excuse me. Don't you think you are going a bit beyond rebuttal? I don't remember Mr. Vincent talking about this matter.

MR. STAVIS: May I have just two more minutes, your Honor?

THE COURT: All right.

MR. STAVIS: Because I would like to relate to your Honor the role of the grand jury and the role of the grand jury proceedings against these scholar-communicators, your Honor. Who would recognize, who would recognize the supposed grand jury proceeding as constituting a shield to the public against the over zealous prosecutor? The reality of this grand jury proceeding is that it is a weapon, a weapon of a secret hearing sought to pick off, to harass, the very group of individuals who more so than any other group have contributed to the emerging [85] public understanding of the nature of the issues with respect to the Vietnam War, and the use of the secret proceeding is designed to extend the entire concept of executive secrecy in the development of policy.

The issue, therefore, comes back to the formulation which Mr. Vincent tried to employ but which I suggest misses the point. The question is not whether Dr. Falk or Dr. Rodberg is or is not a journalist, though it happens that Dr. Rodberg has listed for me a whole series of things that he has in fact published: One, two, three, four, five books, articles in Look Magazine, the Washington Post, everything.

That is not the question. The question is the characteristics of the operation of the First Amendment privilege to prevent the employment of the secret grand jury process, employment of it as a device to throttle, throttle communication to the public of matters of public interest. That is what Caldwell was about, and that is what these cases are about.

Thank you very much, your Honor.

THE COURT: Well, I have indicated already that I won't be deciding these motions off the bench. I want to read some of these cases and consider some of these arguments.

Since nothing more remains to be done, I expect, we will adjourn until Monday morning at nine-thirty.

[Thereupon the hearing was concluded.]

VOLUME 3

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EBD 71-172-G

UNITED STATES OF AMERICA

vs.

JOHN DOE

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 7, Federal Building, Boston, Massachusetts, on Tuesday, October 12, 1971.

APPEARANCES:

Warren P. Reese, Esq.,
Chief Assistant United States Attorney,
Southern District of California,
appeared for the government.

Robert Reinstein, Esq.,
appeared for Senator Mike Gravel.

James Reif, Esq.,
appeared for Leonard Rodberg.

[2] PROCEEDINGS

THE COURT: Good afternoon, gentlemen. Before resuming the patent case - please stay where you are - I hear that counsel in the Senator Gravel/Dr. Rodberg case

are here, or some of them are here. Is anyone here on behalf of the government?

MR. REESE: I am here appearing for the government, your Honor. My name is Warren Reese. I am Chief Assistant United States Attorney from the Southern District of California. I am on temporary assignment to this case.

THE COURT: Well, I received the motion for reconsideration. I have read the memo but not as carefully as I expect to, nor have I had an opportunity yet to read the cases. I will not have oral argument on this motion. I will, however, withhold decision until the government has had an opportunity to file a reply memo, if it wants that opportunity.

MR. REESE: Thank you, your Honor.

THE COURT: I would welcome a reply memo from the government. How long do you think - Have you seen the memo filed on behalf of the senator?

MR. REESE: Yes, I have, your Honor.

THE COURT: And do you expect to file a reply?

MR. REESE: It was my intention to, yes, your Honor.

THE COURT: How long do you think you would need?

[3] MR. REESE: Well, I suspect I would need perhaps two days. I am thinking of -

THE COURT: Well, we will make it Friday.

MR. REINSTEIN: If I may, your Honor.

THE COURT: Pardon?

MR. REINSTEIN: If I may.

THE COURT: Just a moment. I just want to be sure that Mr. Reese - You will have your memo in, then, by Friday.

MR. REESE: Yes. I can do that, your Honor. Incidentally, I should advise the Court that Dr. Rodberg has been subpoenaed to testify before the grand jury on Thursday. This subpoena was issued after your Honor entered his order disposing of the motion.

THE COURT: Well, can his appearance be continued until next week?

MR. REESE: It can be continued until a subsequent time, your Honor, unless next week is a preferable time

for your Honor's convenience.

THE COURT: Well, what is today, Tuesday?

MR. REESE: Yes, your Honor.

THE COURT: Well, why don't you - Well, I would have to have your memo by tomorrow, late afternoon, in order to consider it. It is up to you whether to get a memo in tomorrow afternoon and permit the subpoena to stand subject to further order, or to get the reply memo in on Friday and continue Dr. [4] Rodberg's appearance.

MR. REESE: I think the latter, your Honor, is the desirable course to take. Next week may not be an opportune time, but sometime subsequent to Thursday, and after your Honor has had an -

THE COURT: All right. At least, he is excused from appearing on Thursday, and the stay entered back in September or late August - I have forgotten which - when he was first subpoenaed is now reinstated, so that he may not be called until further order of the Court. And I will look for the government's reply on Friday.

Now you had something else to say?

MR. REINSTEIN: Well, you took care of it, your Honor.

THE COURT: Yes.

MR. REIF: Your Honor, my name is James Reif. I represent Dr. Rodberg. From the way your Honor phrased it, I wasn't sure whether your Honor had received the papers we filed this morning as well. We filed a similar motion and memo as well.

THE COURT: Oh, no, I haven't. All I have here is a motion on behalf of Senator Gravel and a 29-page memo in support of the motion, but you filed similar papers?

MR. REIF: Yes, at about 9:30, and the woman informed us that your office would receive them as soon as you came in.

THE COURT: Well, I just haven't seen them as yet, but [5] if the government wishes to reply to them, the Friday date applies to the motion of Dr. Rodberg as well.

MR. REESE: Thank you, your Honor. May I have an indication of when your Honor expects he may render a decision in this matter?

THE COURT: Well, of course, three weeks ago Friday when I heard you gentlemen on the original motions to quash and specify, I felt I would be coming down with a decision the following Monday or Tuesday, and it was almost three weeks thereafter before I did, so I just cannot predict. I would not expect it would be that long, because I have read so many of the cases cited in the memo, but I want to reread some of them in the light of the arguments here presented, so I am just not going to predict, however, when I will issue a decision, but I hope - I am confident it won't be as long as three weeks, which it was the last time.

MR. REESE: Thank you, your Honor.

THE COURT: So that is the program on these motions.

MR. REESE: Your Honor, for the edification of the Court, I should state that the government has absolutely no intention of interrogating either Senator Gravel or any other member of his staff regarding the speech he made on the 29th of June during a meeting of the subcommittee.

THE COURT: Well, anything you wish to state along those lines I do think is better stated in writing, just so there [6] will be no misunderstanding. You are going to be filing a memo, and such representation as you wish to make along those lines I think should be incorporated in the memo.

MR. REESE: Thank you, your Honor.

MR. REINSTEIN: Before withdrawing, may I just apologize to you for some of the typographical errors that appear in that brief. The time in which we were working was so limited that the normal proofreading -

THE COURT: Well, I am not going to decide it on the basis of any typographical errors, I am sure. So that is fine, and that is the end of the proceedings in this matter, and we will resume in the patent case.

MR. REESE: Thank you, your Honor.

MR. REINSTEIN: Thank you, your Honor.

MR. REIF: Thank you, your Honor.

[Thereupon the hearing was concluded.]

VOLUME 4

UNITED STATES OF AMERICA

District of Massachusetts

UNITED STATES OF AMERICA

v.

JOHN DOE

)
)
) EBD 71-172-G

) EBD 71-209-G
)

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 2, Federal Building, Boston, Massachusetts, on Wednesday, October 27, 1971, and Thursday, October 28, 1971.

APPEARANCES:

Richard E. Bachman, Esq.,
Assistant United States Attorney,
appeared for the government.

Robert Reinstein, Esq., and
Charles L. Fishman, Esq.,
appeared for Senator Mike Gravel.

[2]

PROCEEDINGS

THE COURT: Would counsel come up, please, in the emergency matter. Here is a note I have: "Witness: Webber." Mr. Bachman's problem, which is in the note he wrote to me, is that Mr. Reese is en route to Boston from San Diego. As soon as Mr. Reese arrives, the government is prepared to have a hearing, but in Mr. Reese's absence, Mr. Bachman feels he may not be sufficiently familiar with the proceeding, and there is the way the matter stands.

What I could do is hear you during an afternoon recess or sometime. Has anyone filed an appearance or filed an affidavit or anything on Mr. Webber's behalf?

MR. REINSTEIN: No, your Honor.

MR. FISHMAN: We understand Mr. Webber is out of the country. This is one of the reasons we only discovered Mr. Webber has been subpoenaed by the government to appear before the grand jury.

THE COURT: Well, query, whether there is any matter that could be ruled on short of Mr. Webber's being served.

MR. REINSTEIN: Your Honor, Mr. Webber was served before he left the country.

THE COURT: I see.

MR. REINSTEIN: And was ordered to return tomorrow to appear.

[3] THE COURT: By whom?

MR. REINSTEIN: By the United States Attorney. I believe that subpoena was signed by Mr. Vincent, I am not sure. We have just received word very recently that he was - that this all transpired sometime ago, and that he is expected back in the country tomorrow and expected to appear before the grand jury tomorrow. We have, your Honor, no knowledge of his disposition. For all we know, your Honor, he may be prepared to appear and testify without objection on his part. However, on the part of the senator, we have objections to raise.

We also have information, as you can see in our motion for further relief, your Honor, which raises some serious questions on two scores. One is with respect to the interpretation of your Honor's order of October 4th as to what matters may be inquired into and what matters may not be inquired into before the grand jury. We have information which indicates that the government plans to call witnesses before the grand jury, both today before they cancel and tomorrow, to inquire into matters which we are firmly convinced violate your Honor's order of October 4th.

The government also indicated to us that it is calling witnesses before the grand jury, one of which is Mr. Webber, to testify with respect to matters that are presently under consideration by your Honor in a motion for rehearing. It is [4] our understanding that those matters also should not be inquired into prior to your Honor's ruling in that matter.

THE COURT: Well . . .

MR. REINSTEIN: We would be . . .

THE COURT: I understand the grand jury is not sitting today, for one thing.

MR. REINSTEIN: That is correct, your Honor. It was cancelled.

THE COURT: And I have set a hearing . . . What is today, Wednesday?

MR. FISHMAN: Wednesday, your Honor.

THE COURT: . . . for Friday in the matter of one witness named Mrs. Marx, I believe. I could schedule a hearing for tomorrow morning but, as I say, I am reluctant to keep you over.

MR. REINSTEIN: Would your Honor grant a restraining order until such time as he has heard and decided the motions so that witnesses are not before the grand jury giving the very testimony we seek to prevent while we are arguing?

THE COURT: I will act in any matter only on the basis of a written motion. That is the first thing. I won't . . .

MR. FISHMAN: We have filed a motion for a stay, your Honor.

THE COURT: I have here a motion to quash or stay, a motion to intervene.

[5] MR. REINSTEIN: Yes. And a motion for further relief, your Honor.

THE COURT: Yes. I have the three motions right here. Well, all I can say is that I don't know, without having read them further and giving them further study.

MR. FISHMAN: Your Honor, it will be acceptable for us if a hearing were set for tomorrow morning. We will be glad to stay over in Boston. It is not that inconvenient.

THE COURT: Well, yes.

[The Court conferred with the clerk.]

THE COURT: Here is what we will do. I have too many things scheduled between nine and ten o'clock tomorrow morning. Therefore, we will have to see whether we go forward with Mr. Bachman. All I can say is, I will look

at these papers, I will look at these other matters, which I have already to some extent, of course, and I will just simply have to let you know through Mr. Moynahan. I frankly don't know what I will do at this moment, but I will think of something.

MR. REINSTEIN: Regardless of the time or circumstances, your Honor, we would appreciate an opportunity for short oral argument before your Honor on the matter.

THE COURT: Well, I will let you know as soon as I can, probably shortly after one and shortly before two, as to just what I will do in the way of scheduling a hearing, in the way of ruling on these matters, or in some other respect. I just [6] frankly am not sure at this juncture as to just what I can do. There are other matters either in progress or assigned. Mr. Moynahan will let you know.

[Thereupon the hearing was concluded.]

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA

v.

JOHN DOE

)
)
) EBD 71-172-G
) EBD 71-209-G
)

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 2, Federal Building, Boston, Massachusetts, on Thursday, October 28, 1971.

APPEARANCES:

Warren P. Reese, Esq.,
Chief Assistant United States Attorney,
Southern District of California,
appeared for the government.

Robert Reinstein, Esq., and
Charles L. Fishman, Esq.,
appeared for Senator Mike Gravel.

John Evan Jones, Esq.,
appeared for Howard Webber.

[2]

PROCEEDINGS

THE CLERK: Emergency Business Docket No. 71-209,
United States versus John Doe.

THE COURT: Good morning, gentlemen. For the record, please state your names and the clients whom you represent.

MR. REINSTEIN: My name is Robert Reinstein. I am a member of the Maryland bar and have been previously admitted to practice in this matter. I represent Senator Mike Gravel. With me representing Senator Gravel as co-counsel is Charles Fishman, who is a member of the bar of the District of Columbia and has also been admitted to practice in this matter.

MR. REESE: Warren Reese, appearing for the United States, your Honor.

THE COURT: All right. The matter that is actually set for hearing is this motion pertaining to a subpoena presumably served on a witness, Howard Webber. However, I think that these other motions filed on behalf of Senator Gravel relating to the subpoena served on Mr. Rodberg probably should be heard today also. Have you any different view, Mr. Reese?

MR. REESE: No, your Honor.

THE COURT: All right. Well, that is that. Now let me ask that counsel address themselves first to this motion to quash or stay the subpoena on Mr. Webber. We have heard nothing from the government on this. Perhaps I should get [3] some statement as to the facts from Mr. Reese. There was something stated on counsel's understanding yesterday that Mr. Webber was coming back to this country and would be here today. Is he available, Mr. Reese?

MR. REESE: He is, your Honor. He is in Boston.

THE COURT: He is in Boston. Maybe he is here in the court room.

MR. REESE: He is not in this court room, your Honor, but he is in Boston.

THE COURT: Incidentally, in the past I have asked that any member of the grand jury not attend these hearings. Is there any grand juror here? because I would want him to leave if there were.

[No response.]

THE COURT: Well, I will consider, then, these motions, perhaps first with respect to Mr. Webber, although it might be well for the Court to state that on consideration of these memoranda of law filed in the Rodberg matter, the Court plans to, although it has not actually, endorse a denial on Senator Gravel's motion for reconsideration. The Court wants to hear argument, however, on the matter of the second part of that motion, having to do with a motion to stay the order.

So now I will hear either Mr. Reinstein or Mr. Fishman.

MR. REINSTEIN: Addressing ourselves first, your Honor, to the Webber matter, we have filed a motion to intervene with [4] respect to the subpoena at issue on Mr. Webber, and we have also filed a motion to quash or to stay the grand jury subpoena.

Our motion to intervene and the motion to quash and stay is primarily on the same basis as in the Rodberg case, and we ask for the same relief. It is our belief that Mr. Webber has been called by the government to testify before the grand jury concerning the attempts by Senator Gravel to have the record, the official record, of the Senate Subcommittee on Buildings and Grounds, which was compiled on June 29th, published and made available to the public.

Your Honor has in the record of the Rodberg case an article in the Boston After-Dark, a three-page article, which describes in great detail Mr. Webber's role as Director of the MIT Press and negotiations on the publication of the subcommittee record which were held between Mr. Webber

and Senator Gravel and members of his staff. Your Honor has already relied on these articles in the Rodberg matter, and we would like to incorporate them herein.

The precise issue, therefore, is whether or not the grand jury may inquire into actions by a member of Congress to make available to his constituents or the public by republication an official record of a Senate subcommittee. This is, of course, a matter your Honor has under reconsideration in Dr. Rodberg's case and which your Honor has now advised us that he intends to deny.

[5] THE COURT: Right.

MR. REINSTEIN: Because of the complexity of the issues, your Honor, and the fact that at the very least, we believe some of the cases, if not all, that we have cited in our memorandum of law give support for our position, we would ask for a stay in both the Webber case and the Rodberg case pending appeal. The problem, of course, is that we have no control over the witnesses. There is no means at all for Senator Gravel to obtain appellate review on this very, very important question except by a stay being issued by your Honor or by the Court of Appeals pending an appeal.

As we pointed out, the Supreme Court held in the Peflman case that denial of a motion to quash a subpoena with respect to an intervenor, such as Senator Gravel in this case, is a final order and is appealable under 28 U.S.C., Section 1291. We are not asking, therefore, for certification; we are simply asking for a stay pending appeal.

This precise issue has never really before been presented to the Courts of Appeals or to the United States Supreme Court, and all of the cases which were cited by both ourselves and by the government relate to libel cases. A civil suit in a libel context is different, given the historical underpinnings of the speech and debate clause. Therefore, in order to preserve Senator Gravel's legal position to appellate courts in a manner in which it can be decided by them and is not [6] mooted by these witnesses' appearing before the grand jury and deciding, as they very well may,

to answer questions posed on republication, it is essential that a stay of the subpoenas be granted.

THE COURT: Let me hear from Mr. Reese. I will get back to you on other points, but I would like to get, preliminarily at least, the government's view on these motions.

MR. REESE: Well, your Honor, it appears that the motions have been stimulated or motivated by the protective order which was included in your Honor's order denying the original motion to quash, and that the senator desires to be given some sort of supervisory control, some surveillance, if you will, of the government's investigation, the grand jury's investigation, so that he can be sure that the protective order is not violated.

THE COURT: Well, that is not the principal point of the senator, as I understand these motions. The principal quarrel that he has with the Court's protective order is that it does not forbid inquiry into the republication.

MR. REESE: Yes, your Honor.

THE COURT: That is not the only point on which he wishes to appeal, at least the clearest point. Now what I would like you to comment on is whether you consider that there is any method of obtaining appellate review of this Court's order other than the way suggested by Mr. Reinstein, or whether you [7] feel that the matter is so lacking in substance as not to be appealable. I don't know what your position is on this matter.

MR. REESE: Well, our position more nearly approximates the latter proposition that your Honor just stated. We don't feel that the order is final or appealable. Neither do we feel it is worthy of certification. The senator has not yet been affected by any act of the government, and I suggest to your Honor that he would not be affected until such time as any evidence obtained through this grand jury investigation was sought to be used against him in an administrative or judicial proceeding, whether criminal or civil.

I don't mean to suggest by that statement that we entertain the use of any such evidence against him, but it seems to me that he has not been injured as a consequence of

questioning which takes place before the grand jury, and consequently, your Honor's order does not at this point have such operative effect as to impose any injury or disability on him and it will not unless and until the order is disobeyed, and we certainly don't intend to disobey the order, and if evidence is elicited, if and when it is used in such a way as to affect Senator Gravel's legal status. His status has not been affected at this point.

THE COURT: I am far from clear that the speech and debate clause prohibits only use. It speaks in terms of inquiry, you see. Any inquiry is forbidden, not just any use.

[8] But let me get back to Mr. Reinstein, please, on a different aspect of this matter.

MR. REESE: Yes, your Honor.

THE COURT: Well, I would rather talk just to Mr. Reinstein, although I will hear Mr. Fishman later if you want or if you have something not covered by Mr. Reinstein.

I am not clear that the Perlman case is applicable in this circumstance, and I would like you to discuss Perlman a little bit further.

MR. REINSTEIN: Yes, your Honor.

THE COURT: Do you have an appealable order? That is one question I have. The second question I have is this: I don't think that Mr. Webber's situation is the same as Dr. Rodberg's; that is, the relationship is not the same. The reason for the Court's permitting Senator Gravel to intervene in the matter involving Dr. Rodberg was the same as the California court in Caldwell.

Caldwell was an employee of the New York Times. The New York Times was permitted to intervene. Dr. Rodberg was on the personal staff of Senator Gravel. He was not in every respect but substantially in the same position as was the New York Times in the Caldwell case. We are lacking that relationship here. Query, whether Senator Gravel has a relationship to Mr. Webber which would warrant his intervention.

So those are two questions I would like you to speak to, [9] the right to intervene, and secondly, whether you do

have an appealable order, short of a court order directing Mr. Webber to testify, or some order beyond what you have stated you believe would be a sufficient basis for appeal.

MR. REINSTEIN: Well, your Honor, first, on the intervention, our basis for moving to intervene in Dr. Rodberg's case was that Senator Gravel's legal rights were being threatened by the grand jury proceeding. It wasn't merely that Dr. Rodberg was an employee or agent of Senator Gravel, but that the grand jury inquiry was directed to Senator Gravel, and we believed that that inquiry was barred by the speech and debate clause.

Now, in your Honor's protective order, your Honor forbade the questioning of any witness, not just Dr. Rodberg, with respect to subject matter which your Honor held was barred from inquiry by the speech and debate clause. Therefore, it seems clear to us that Senator Gravel's rights in the Webber case stand on exactly the same footing as in Dr. Rodberg's case because our claim is essentially identical, that is, that a witness is being called before the grand jury and the government intends to ask him questions about matters which we believe they cannot do constitutionally.

We have no control over this witness. We have certainly less control over Mr. Webber than we conceivably could have over Dr. Rodberg. If Mr. Webber decides to enter the grand [10] jury room and testify about these matters-- and we feel that this is a violation of the speech and debate clause-- in that event the Constitution will be violated, and there is no subsequent remedy for that violation, because the constitutional violation, as Mr. Rodberg pointed out before, is the inquiry itself.

Indeed, in *United States versus Johnson*, when Johnson made a motion to quash the indictment because the grand jury had elicited impermissible evidence, the Court of Appeals ruled the indictment could not be quashed on that basis. So even if we accept Mr. Reese's suggestion that some rule might be fashioned, if the government decides to continue its inquiries in criminal proceedings against Senator Gravel,

there in fact is not even a proper exclusionary rule, but in any event, the point of the speech and debate clause is to prevent the questioning itself, to prevent harassment, and it extends to the principle of separation of powers, which prohibits judicial inquiry into the matter under protection.

The issue in Mr. Webber's case is the same as one issue in Dr. Rodberg's case, and that is whether or not the grand jury may inquire into activities of Senator Gravel in attempting to have published the official record of a Senate subcommittee. That is certainly a very substantial question for the appellate court, and I suppose that brings me to the question of the appealability of denial of the motion to quash, and discussion [11] of the Perlman case. Actually, your Honor, the Perlman case also involved intervention, and I think it supports our motion to intervene as well.

What happened in Perlman was that Perlman was involved in a civil suit in which certain of his property was obtained by discovery and then introduced into evidence, and one of the lawyers in the case had possession of the property. The United States Government then decided to investigate Perlman for alleged violations of federal law before the grand jury, and a subpoena was issued directed to the lawyer who possessed Perlman's property. The lawyer did not dispute the subpoena. The lawyer was quite willing, as Mr. Webber may be in this case, and Dr. Rodberg, to appear before the grand jury and, in that instance, to turn over the property.

Perlman then filed a motion to intervene in the District Court - I believe it was then called Circuit Court - and Perlman moved to quash the subpoena and to obtain his property back. His arguments were two-fold on intervention. One was proprietary argument, that he had a proprietary interest in the property, but the other, which was the more fundamental argument and the only one discussed on the merits by the Supreme Court, was that the subpoena itself violated Perlman's Fourth Amendment rights, in that it amounted to an unlawful search and seizure.

The Supreme Court held, first, that on either basis, [12] Perlman had a right to intervene, and second, the Supreme

Court held that the denial of the motion to quash the subpoena was a final, appealable order. The government's arguments in that case were, I think, identical to the argument set forth here by Mr. Reese, that Mr. Perlman should have waited until the proceedings were completed and the constitutional harm done and then try somehow, in some unspecified way, to get his property back and to somehow remedy what he contended was unlawful search and seizure, and the Supreme Court held unequivocally that Perlman had a right to appeal and that it was a final order and not interlocutory.

We have also called your Honor's attention in our reply brief to numerous cases in the Circuit Courts of Appeals which have established the proposition, particularly in cases like this where third parties who were intervenors are concerned, that where one of those third parties or intervenors is asserting a legal interest in either a subpoena issued by a grand jury or a subpoena in a civil case, and a motion to quash is denied, or, for that matter, granted, even though both of these actions are normally not appealable under Section 1291 as final orders, they are if that party can show that there is no alternative means of securing appellate review before the constitutional harm is consummated and there is no means of redressing them.

That is precisely the case that we have here. If the grand jury is permitted to go ahead and question Dr. Rodberg [13] and Mr. Webber about the question of republication, and they in their discretion decide they would not wish to be held in contempt of court and will therefore answer these questions, there is no way for us to file an objection, since Senator Gravel has no right, nor his representative, to be inside the grand jury room.

There is no post hoc exclusionary rule that can remedy the harm done, and if we are right that this is prohibited by the speech and debate clause, there will be a constitutional violation and it will turn into a fait accompli. As a matter of fact, it would seem to me that at that point the case would be entirely mooted and we could never take an

appeal, given the United States versus Johnson, from what the grand jury did even should the government decide later on to continue its criminal proceedings against Senator Gravel.

THE COURT: Now I would like to put a question, but since you have said three times that these proceedings are against Senator Gravel, I am constrained to say that I have never observed any indication in any of these papers that this proceeding is directed against Senator Gravel.

MR. REINSTEIN: By directed against Senator Gravel I meant, your Honor . . .

THE COURT: There are inquiries being made of things that he may have participated in, of perhaps not, but surely I have never seen any indication that he is a subject of any grand [14] jury investigation. I think that should be noted.

MR. REINSTEIN: Well, your Honor . . .

THE COURT: I haven't seen any such indication.

MR. REINSTEIN: Yes. I am not suggesting, your Honor, that the government intends to indict Senator Gravel. I wasn't suggesting that. The point I was making . . .

THE COURT: Well, I know what point you were making, but I think you may be overstating just a little bit the . . .

MR. REINSTEIN: Well, the grand jury is part of the institution of criminal proceedings, your Honor.

THE COURT: Well, I would not have mentioned it except that you said three times that there was a grand jury proceeding against Senator Gravel. I just don't think the evidence supports such a characterization.

Let me ask this . . . two things: I am considering granting a stay for a short period of time, such as a week or ten days, during which time an appeal might be taken and a further stay granted by the Court of Appeals. That is at least a possibility here. Do you think that there is a proper distinction drawn between Mr. Webber and Dr. Rodberg on the basis of Dr. Rodberg's having filed statements in briefs and in oral argument through counsel to the effect that he feels duty-bound to resist the grand jury subpoenas?

Here is what I have in mind: Any doubt as to the appealability of any order that I might make would be removed

should [15] I order Dr. Rodberg to testify, and perhaps, should he refuse to testify, the Court would entertain, if the government wants to seek one, an order that he be held in contempt, which motion I would act on, but should I make such an order, a stay would be more likely in such a situation . . . would be likely, let me put it that way, in such a situation, and there would be no question as to the appealability of such an order.

I do feel that there may be a distinction here with regard to the senator's rights in the Rodberg matter and in the Webber matter, and I would like to hear your view of that. Hasn't Dr. Rodberg already gone on record in these proceedings to the effect that he considers, due to his being a member of the senator's personal staff, he is duty-bound to refuse to answer these questions? Why shouldn't the Court proceed on that basis?

MR. REINSTEIN: Your Honor, I don't think Dr. Rodberg has ever represented to the Court that he will not testify before the federal grand jury. We do not, of course, represent Dr. Rodberg. Senator Gravel has no legal power over Dr. Rodberg. Given the secrecy of the grand jury proceedings, we are not even in a position to be able to find out after the fact exactly what happened in the grand jury proceedings.

Your Honor possibly may be correct. I honestly don't know. I have not discussed either Dr. Rodberg or his counsel what he intends to do should all of his motions be [16] denied and another subpoena served on him or an order served on him to appear before the grand jury. It does seem to me, however, your Honor, that it may be impermissible speculation to assume that Dr. Rodberg will not answer those questions upon the threat of a contempt citation against him.

With respect to Mr. Webber, I suppose your Honor is suggesting that the appealability in Mr. Webber's situation is probably stronger than in Dr. Rodberg's, and . . .

THE COURT: No. I am suggesting only that the appealability of . . . an order directing Dr. Rodberg to testify or

adjudging him in contempt for refusal to testify is clearly appealable.

MR. REINSTEIN: Yes, your Honor.

THE COURT: There you remove any doubt about the Perlman applicability. What about a stay of a short period of time, perhaps one week, subject, of course, to a further stay being granted by the Court of Appeals? How long would you need to appeal an order of this Court? You would appeal it promptly, I would assume.

MR. REINSTEIN: Yes, your Honor. We would appeal almost immediately.

THE COURT: Well, let me ask Mr. Reese some questions about this matter. One of them I neglected to ask before is whether or not Mr. Webber is represented by counsel of his own selection.

[17] MR. REESE: Yes, he is, your Honor.

THE COURT: And who is his counsel?

MR. REESE: Mr. John Curtin, who has his office here in Boston.

THE COURT: Is Mr. Curtin present in the court room?

MR. REESE: No, he is not, your Honor.

MR. JONES: I am associated with Mr. Curtin. I haven't had an opportunity to discuss the case at any length with Mr. Webber, since he has just returned from out of the country.

THE COURT: Well, there has been no appearance filed. I just wondered if he had separate counsel, which he evidently has.

MR. JONES: Yes, your Honor.

THE COURT: Thank you. What now are your comments, Mr. Reese, on these points made by Mr. Reinstein? if any. I am not requiring that you do so. You have already stated the government's position generally, but I wondered if you had any particular points to raise in response to Mr. Reinstein.

MR. REESE: I don't think I can offer anything new, your Honor. We feel, as I have indicated, that the speech and debate clause is concerned with a congressman being

called to account for conduct, as distinguished from being protected from questioning in an interrogating setting, so to speak, but I want to confirm that the government entertains no idea of proceeding against Senator Gravel. That is simply not probable in this case at all.

As far as the witness Webber is concerned, certainly the [18] subject matter of his testimony could not logically be limited in any event to statements or conduct of a staff member of Senator Gravel regarding a mission that he might have been on as a representative of Senator Gravel for the purpose of publication of the Pentagon papers. There are other factual components which we have a legitimate interest in which might be forthcoming from the witness Webber which have absolutely nothing to do with this contact with a representative of Senator Gravel's staff.

THE COURT: Well, that introduces a new element, you see. It has been assumed by the senator's counsel, and also by the Court, that your interest in Mr. Webber related to the conversations between him and Dr. Rodberg that were described in that Boston newspaper article. To the extent that your inquiries of Mr. Webber have to do with other matters than republication of the senator's incorporation of the Pentagon papers into the subcommittee file, well, then, I expect different considerations would be controlling.

MR. REESE: Well, your Honor, I didn't want to suggest that there was an obviously separate area of inquiry. I must in fairness concede that the other areas of interest to us are ancillary, so to speak, or originated from the contact made by the senator's representative.

THE COURT: Well, thank you.

MR. REESE: So they are not that easily segregated.

[19] THE COURT: I just wanted to ask. Mr. Fishman had some point. I don't want you to just repeat something Mr. Reinstein said. If you have some separate point to make, however, I will hear you, as I said I would.

MR. FISHMAN: With respect, your Honor, to the question we are dealing with, it seems to me, there are three basic points I would like to make fairly clearly. The first

is that the issue before your Honor I submit does not revolve around the status of Mr. Webber or Dr. Rodberg, but revolves around the point the Court made earlier, which is whether or not under the speech and debate clause there can be an inquiry.

If that is the key, inquiry, prohibition of inquiry, it doesn't seem to matter what the relationship is between people so long as they have privileged knowledge. Dr. Rodberg does have privileged knowledge, as the Court has recognized. Mr. Webber does have privileged knowledge, as counsel for the government just stated. If in fact we are correct, the republication is protected. That is the basis upon which we seek to intervene, not the status of the parties, but the nature of the inquiry sought by the government.

The second point is on the question of appealability. In the Perlman case, the court specifically said that the only reason Perlman's appeal was allowed was the absence of any other remedy to Mr. Perlman; if he was going to raise the question at all and secure a ruling on his constitutional [20] point, the only way that could happen is if the court took the order as a final order for purposes of the federal statute.

We have precisely the same question here. It is a functional approach. If this Court should hold that the order is not appealable, then there is no other vehicle by which the senator can raise the question. There is an absence . . .

THE COURT: That is a point that was pretty well discussed by Mr. Reinstein. I don't want a rehash of Mr. Reinstein's argument but whether there was something separate you had in mind.

MR. FISHMAN: No. That is all, your Honor.

THE COURT: I will take these motions . . . Well, I guess Mr. Reese has something to say. He consulted with his associate.

MR. REESE: Without abandoning our opposition to the theory that the Court's order is appealable, I would like to point out to the Court that this investigation has been very, very seriously impeded. I don't think anybody would deny that. However, if the Court grants a stay for a short period

of time for the purpose of accommodating filing of a notice of appeal, I would urgently request that that period of time be very short and that a condition of it be that the senator be ordered to file his appeal within twenty-four hours. I think that is really just a rather perfunctory form of proceeding, a piece of paper filed indicating that the movant intends to appeal [21] the decision of the Court.

THE COURT: Well, I will consider the point, but actually the time limit on the stay would be gauged not simply to counsel's speed but to the availability of the Court of Appeals. Judge Aldrich in the Court of Appeals chances to be at the Judicial Conference of the United States, in Washington.

MR. REESE: I see.

THE COURT: He is not in Boston today. That is another consideration. But I had one other — Oh, this matter of impeding of the grand jury investigation. I just don't like to let these comments go without the Court's comments. I was constrained to comment when Mr. Reinstein said three times that the senator was a target, or implied that the senator was a target of this investigation. As far as the delay of the grand jury proceedings is concerned, I think the delay has been at least partially attributable to the necessity of government counsel's being all over the country in this matter.

I am thinking, for example, of the matter set for hearing tomorrow morning. The government requested a ten-day or two-week postponement. I was prepared to hear that matter a week or more ago, and it was set down for tomorrow because the government asked that the hearing be scheduled for some time on or after the 28th of — I think it was after the 28th of October, so I don't consider that the delay here can be attributed to anybody. I think it is in the nature of the [22] situation, and I don't charge these witnesses or defense counsel or anyone, including government counsel, with the delays. These delays are just in the nature of the situation.

MR. REESE: I understand, your Honor. I should have used the word delay. Incidentally, as to the matter that

was to be heard tomorrow, I noticed for ten days out of consideration for counsel for the witness in that case. I would have been delighted to have it heard immediately. It was no convenience of mine that was a factor in that ten-day period.

THE COURT: That is what I mean by the nature of the situation. These delays are sometimes required by the complexity of the problems presented.

I will take a short recess and come out and announce my ruling on this matter.

Mr. Reinstein wants to get in the last word.

MR. REINSTEIN: Well, your Honor, we also have the question of the motion for further relief to be discussed.

THE COURT: Oh, I am considering that. I have it here. I thought that your remarks had encompassed that.

MR. REINSTEIN: No, your Honor, they did not. The motion for further relief is somewhat separable from our motion to intervene and to quash in the Webber case.

THE COURT: Well, then, say what there is to this over and above what you have already said.

MR. REINSTEIN: Yes, your Honor. Subsequent to your [23] Honor's memorandum and decision of October 4th, we obtained information which made it necessary for us to file this motion for further relief and also a motion for a stay of all grand jury subpoenas outstanding, that were issued by this particular grand jury.

The reasons for this are two-fold. First, we have learned that the United States Government has subpoenaed witnesses who possessed information on the issue of republication. I am referring not only to Mr. Webber and to Dr. Rodberg, there are other witnesses as well. We do not have, unfortunately, a list of all of the witnesses whom the grand jury has subpoenaed. We do have information, though, that from the names that we have now, a substantial number of them do possess information on the issue of republication, and in prior conversation with Mr. Reese, he was fairly forthright in admitting that the grand jury was interested in that question.

Secondly, we have also learned that the United States has subpoenaed certain other witnesses for the purpose of inquiring into matters which we believe are barred from inquiry by your Honor's protective order of October 4th. We do know that certain witnesses possess privileged information, first of all, and second of all, again, in discussions with Mr. Reese on October 12th, he did tell us that the government was interested in finding out the source of the material which Senator Gravel used to prepare for the subcommittee hearing on June [24] 29th and the material which was then inserted into the record. We believe that this and other questions of privileged information which these witnesses possess have to be determined in advance, or else there is the same threat as there is in the Rodberg and Webber case of Senator Gravel's constitutional rights being violated without any mechanism being available for us to object and for the Court to construe the meaning of its protective order of October 4th.

We therefore moved that the United States provide a listing of all of the witnesses who have been subpoenaed or are scheduled to appear before the federal grand jury in order that it may be determined which of these witnesses, in addition to the ones that we know of already, possess privileged information or are in the position of Mr. Webber and Dr. Rodberg, and then we would like with respect to those witnesses a hearing to be held to determine what relief can be granted to Senator Gravel.

We propose here, as with Dr. Rodberg and Mr. Webber, that the only feasible technique is a governmental specification on the proposed scope and the questions to be asked by the grand jury, as the government did in the case of United States versus George and the Caldwell case. They did that voluntarily, and they were ordered to do that by the District Court in the Verplanck case as a prerequisite for continuing.

Those cases involved issues of much lesser constitutional [25] importance. At least, United States versus George did. The court there was concerned with a nonconstitutional

privilege, the husband-wife privilege, as well as the right of a person not to be called by a grand jury on the same matter for which he has been indicted. The government there voluntarily provided a specification.

The Caldwell case involved issues of substantial constitutional importance under the First Amendment, and so did Verplanck, and the issues we are raising here are at least as important in the context of separation of powers and the free speech rights of members of Congress.

The government has never responded to our argument that a specification was necessary and that it is impossible for there to be scrupulous compliance with a protective order and judicial review of it without the court's overseeing what is happening in advance in the grand jury. This is a technique that the Supreme Court has ordered in First Amendment cases involving seizures of allegedly unprotected written material and injunctions against demonstrations.

We don't see, particularly with the fact that the government has subpoenaed Mr. Webber particularly - we might also mention Mr. Chomsky, who has information on the issue of republication, and whom we believe the government has subpoenaed for that purpose. The government has done this even though your Honor took under reconsideration at that very time our [26] motion for reconsideration on the very issue of republication, which is dispositive of the Webber case, at least, and probably the Chomsky case.

THE COURT: The reason for the Court's taking it under advisement was to enable the government to reply. I didn't wish to rule on the matter without giving government counsel an opportunity to reply.

MR. REINSTEIN: And what the government did was, thereupon. I am not accusing the government of bad faith; I am just trying to illustrate the difficulties we have in trying to assure Senator Gravel's rights under the protective order will in fact be sustained, because in the interim, the government subpoenaed at least two people for the purpose of inquiring into the question of republication while your Honor had the motion for reconsideration under advisement.

and while the stay of the subpoena to Dr. Rodberg was issued.

We also have the fact that the government has told us that they were very much interested in finding out the source of material that a United States Senator obtained and used in preparation for a speech in a subcommittee report. We think that is barred by the first provision of your Honor's protective order. We also know there is other information which proposed witnesses have which relates to the conduct of the hearing itself, the preparation for it, and conduct antecedent to it which is intimately related to the subcommittee hearing.

[27] THE COURT: It is things done by the senator, not by Dr. Rodberg. It is not things done by other persons.

MR. REINSTEIN: Yes, your Honor.

THE COURT: In other words, if these papers, let's say hypothetically, passed through the hands of Mr. X and Mr. Y before they came into the senator's possession, I don't expect that any reasonable construction of the first paragraph in the protective order would bar inquiry into the actions of Messrs. X and Y.

MR. REINSTEIN: We are not suggesting that. We are suggesting that the inquiry that the government intends is to find out how Senator Gravel himself, first of all, obtained the information, how he prepared for the hearing. The information which we are talking about is information which people know of. With respect to Senator Gravel himself —

THE COURT: Let me ask some questions of Mr. Reese on this matter.

MR. REINSTEIN: Yes, your Honor.

THE COURT: What is your response to these points?

MR. REESE: Well, my response, your Honor, is along the lines of the hypothetical that your Honor just presented on X and Y. I have got to deny the factual assertions made by counsel here that we are concerned with Senator Gravel's activities with regard to these papers and the preparation of his meeting and the reading into the record of the papers and [28] and so on. We are definitely interested in the

sources of the papers, and it seems to me I made that fairly clear in my comments to counsel on the occasion of our first meeting.

Incidentally, your Honor, I suppose I should go on to say in response to counsel's argument that we would effectively be deprived of an investigative tool which is legitimately ours, it goes without saying, if what was permitted was virtually unfettered surveillance by the senator of the scope of the investigation.

THE COURT: Here is the other problem raised by Mr. Reinstein: Pending appeal, perhaps the Court should consider some sort of protective order relating to the republication insofar as the senator, either personally or through Dr. Rodberg, took actions directed toward republication. I am aware that on the merits I felt that the government was sound in its position that republication was not embraced by the speech or debate clause. I surely, however, could not characterize as frivolous the position taken by Senator Gravel's counsel. What would the government's view be toward refraining from, pending appeal, exploration of things done by either Senator Gravel or Dr. Rodberg in connection with republication?

MR. REESE: May I confer for just a moment?

THE COURT: Yes.

[Brief pause.]

MR. REESE: Well, your Honor, the government's position [29] is that we should not agree to that approach because of the possibility of our conducting an investigation into the sources of publication of the Pentagon papers by other entities which could conceivably lead us to the identification of Dr. Rodberg as a source, and then we would be coming up against the problem which would be presented by this kind of a protective order.

THE COURT: Well, I will take these matters under advisement for a short period of time. Do you have some final point?

MR. REINSTEIN: Yes, I do, your Honor. I would just like to make the point that the discussions that have gone

on now about the two questions of the propriety of proposed questions before the grand jury, we just meant those to illustrate the problems that we have of enforcing and that the Court has in judicial review of enforcing the protective order. We now have debates upon the legality of two proposed questions. We cannot anticipate all of the proposed questions.

I don't think we can ask to post a sentry outside of the grand jury room door to see who is being called and whether he knows anything about Senator Gravel. That is why, your Honor, in the motion for further relief we have asked for a listing of the names of these people and a determination of which ones have privileged information, so that some sort of specification procedure or another procedure of that sort can be used [30] to insure judicial review of these questions. The same thing is going to happen in the grand jury room, with one difference, and that is, the witness will be in no position to determine whether or not the government is violating, albeit unintentionally - we don't accuse them of bad faith - but in any case, the witness cannot determine your Honor's protective order and whether or not questions posed to him are barred by the protective order or whether there is a substantial question as to whether or not they are. That is why we are asking for a specification that the government has characterized as our position of surveilling the grand jury, which I think is incorrect, your Honor, given the fact that the government has voluntarily used this exact procedure before in cases of lesser constitutional magnitude.

THE COURT: You have said that before. We will not take a recess.

[A recess was taken.]

AFTER RECESS

THE COURT: Here are my rulings on these matters. First, in the Webber matter, the motion to intervene is allowed. With respect to the motion to quash or stay the grand jury subpoena, the motion to quash is denied but the

motion to stay is allowed to the extent that enforcement of the subpoena on [31] Howard Webber is stayed for ten days. I haven't written out in the margin the purpose, which I think is obvious. It is contemplated that counsel for Senator Gravel as intervenor will appeal promptly, and the stay for ten days is allowed rather than three or five or seven because whether the stay should be extended is the sort of question that has to be given some consideration by the Appellate Court.

Those, incidentally, are in EBD 71-209. The Clerk's Office opened up a separate case with respect to Mr. Webber.

Now with regard to 71-172, which has to do with Dr. Rodberg, there are similar orders entered. On the motion of the senator for reconsideration and stay pending reconsideration or appeal, the motion for reconsideration is denied, but the motion to stay is allowed to the extent that enforcement of the subpoena on Leonard Rodberg is stayed for ten days, and the other orders in that case are parallel.

The government filed a motion for an order commanding Leonard Rodberg to appear before the grand jury today. That motion is denied without prejudice to renewal upon expiration of stay or stays, as the case may be, of enforcement of the subpoena on Leonard Rodberg granted on the motion of the intervenor, Senator Gravel.

Now we have here a motion by Dr. Rodberg for rehearing or certification, and for stay. The motions for rehearing or certification are denied. The motion for stay is mooted by [32] the stay of ten days granted on the motion of Senator Gravel. In other words, the party here who has standing to appeal and whose interests are at stake is the intervenor, Senator Gravel, and is not Dr. Rodberg. It is on the senator's motion, not on Dr. Rodberg's, that the stay is granted, but the effect is the same. Dr. Rodberg may not be questioned by the grand jury for a period of ten days. Whether that period is longer than ten days will be something that will be decided by the Appellate Court.

Now, on the motion for further relief, I have not written the order as I have in the other motions because there is

not room in the margin to write what I will write when I get downstairs this noontime, or after the noon recess. With respect to this motion for further relief, I don't know whether it should be said it would be denied in part and allowed in part, but this is what I will be writing. It is denied to the extent that it requires the government to list witnesses and to file lists of questions that are going to be asked of witnesses and in other respects to sort of preview the grand jury's interrogation to be sure that the senator's rights are not violated. It will, however, be allowed to this extent: that the Court will fashion a supplemental protective order of the same duration as the stay barring inquiry into acts done either by Senator Gravel, or by Dr. Rodberg as his agent, arranging for the republication of the Pentagon papers.

[33] I will say by way of explanation, I am not granting the relief in the form of lists of witnesses and questions and that sort of thing, because the Court relies, and feels it has good reason to rely, on the intelligence and good faith of government counsel in abiding by the Court's protective orders. I don't need to be at government counsel's elbow to be sure that unambiguous orders are obeyed. That is the reason I want to write this rather than just state it orally. I want to be certain that the supplemental protective order contemplated is in writing such that it can be a clear guide to government counsel.

The purpose of it is, I trust, obvious, and that is that until the Court of Appeals has had a look at this case and these motions, the substantial point which Senator Gravel seeks to preserve must be protected, and absent the supplemental order that I have outlined, the point could be mooted by questions which would be answered by grand jury witnesses, without any means of protecting and preserving his point.

I hope to file this order in writing this afternoon, but in the interim I would specifically direct government counsel to abide by what I have said at this time.

I think that disposes of the motions that are pending to be heard this morning. I don't think it disposes of them to everyone's satisfaction necessarily, but is there anything that is pending that has not been ruled on?

[34] MR. FISHMAN: Well, just one minor item we would point out, your Honor, which is, on the motion for further relief we also specifically addressed ourselves to the question of how Senator Gravel received the papers. One allegation —

THE COURT: Yes, but I consider that the order already entered covers that.

MR. FISHMAN: In the sense — I want to make it for the record, your Honor — in the sense that your Honor's order prohibits the government from questioning any witness now or possibly in the future who are to be brought before the grand jury with respect to how Senator Gravel got those papers. Is that correct, your Honor?

THE COURT: It bars inquiry into what he did or what Dr. Rodberg did after Dr. Rodberg was hired as the Senator's assistant. It does not bar inquiry into what Dr. Rodberg did previous to his becoming an assistant.

MR. FISHMAN: That is correct, your Honor. That is correct.

THE COURT: Or members of the Senator's personal staff. All I can do is repeat the X and Y example. Whatever he did is privileged and may not be inquired into, but let's — Well, really, all I have to say is, read the Johnson case again. That is all I can recommend. I am not going to enlarge upon the memorandum I wrote. I endeavored to spell it out in the protective order already entered, and I think I did, so [35] I am not going to enlarge upon that further at this time.

MR. FISHMAN: That is satisfactory.

THE COURT: And I don't know who is going to be here tomorrow. What is on for tomorrow?

MR. REESE: Mrs. Marx, your Honor.

THE COURT: Mrs. Marx.

MR. REESE: And Mr. Chomsky.

THE COURT: And Prof. Chomsky.

MR. REESE: Yes, your Honor.

THE COURT: All right: Well, that concludes this matter. And we will get the jury in the land damage case.

MR. REINSTEIN: Thank you, your Honor.

MR. FISHMAN: Thank you, your Honor:

[Thereupon the hearing was concluded.]



VOLUME 5

[Caption Omitted in Printing]

DONALD M. WOODRING, sworn
Direct Examination by Mr. Reece

[54] Q. Would you give the Court your name and address and current employment? A. Donald M. Woodring. I am assigned to the Boston Division, Federal Bureau of Investigation,

Q. Pursuant to that employment, Mr. Woodring, when did you first call on the New England Merchants Bank? A. I believe it was last Wednesday.

Q. Last Wednesday.

THE COURT: A little louder please. I am the gentleman who is supposed to be hearing this.

THE WITNESS: Excuse me. It was Wednesday.

Q. Was that before the subpoena was served or after?

A. To my knowledge it was after the subpoena was served.

Q. Did you call upon the bank before the subpoena was served? A. No, sir.

Q. To your knowledge did anyone else from your agency call upon the bank? A. I have no idea.

Q. Who did you have conversation with on Wednesday when you first called on the offices of the bank? A. W. Clifford Gittins. He is Assistant Vice President.

[55] Did you talk with any other officers of the bank on that date? A. No, sir.

Q. When did you next visit the bank? A. I haven't been there since Wednesday.

Q. Wednesday of last week? A. Just this past Wednesday.

THE COURT: We are talking about two Wednesdays then?

THE WITNESS: No, sir, one day.

THE COURT: I thought you said you went to see him before the subpoena was served.

THE WITNESS: No, sir. I said I did not.

THE COURT: I beg your pardon. If you will please keep your voice up? This is a big room.

THE WITNESS: Yes, sir.

Q. So this past Wednesday was the first time you visited the bank? A. That's true.

Q. And to your knowledge it is the first time anyone from your agency had visited the bank?

MR. BACHMAN: Well -

A. Well, someone, it is my understanding that someone was over there to serve the subpoena.

[56] Q. Is it your understanding someone was there prior to the service of the subpoena? A. No, to serve the subpoena.

Q. Is it your understanding - do you understand whether anybody was there before the service of the subpoena? A. I have no idea as to that.

Q. Who accompanied you on Wednesday, this past Wednesday, when you went over? A. This would be Special Agent Charles Hickey.

Q. Is he in the court room today? A. No, sir.

Q. Is he in this building today? A. I have no idea.

Q. Would you tell the Court what you did at the bank on this day? A. Yes. I went into Mr. Gittins' office, and he was not in the office at the time I walked in. I had called him before I went over so he was expecting me, and his secretary was present. She said, "What you want to see is here."

Q. Do you know her name? A. Mrs. Hume. I believe. She said, "The documents you're looking for are right here."

Q. I can't hear you.

[57] MR. REECE: Your Honor, I don't hear him well either.

Q. Would you mind keeping your voice up? I can't hear you, sir. I apologize. A. I always think I'm talking too loud and end up going down. She said, "The documents that you're interested in are here on the desk. If you want to sit down, fine."

Q. So at the time you made this visit there had been collected for you some bank documents? A. That's correct.

Q. Which were turned over to you? A. That's correct.

THE COURT: He didn't say they were turned over.

Q. They were given to you for your inspection? A. For examination, that's right.

—Q. Who was present while you inspected these documents? A. Mrs. Hume was sitting at her desk. Special Agent Hickey was there. And after very few moments Mr. Gittins arrived.

Q. What did you do in reference to these documents? A. All I did really was to page through them, noting the description of the account, and attempted to eliminate [58] those accounts which I felt we would not be interested in.

Q. What was the criteria for determining what you would be interested in or would not be interested in? A. I felt that what we will be interested in would be a general operating account, and on that basis I could eliminate the payroll account, a building management fund, and things of that sort.

Q. What was your interest in the general operating account?

MR. BACKMAN: I object.

THE COURT: Excluded.

Q. What did Mr. Hickey do in connection with these documents? A. I don't know that he did anything except sit there with me while I looked at them.

Q. Did either of you make any copies? A. No, sir.

Q. Did either of you make any notes as a result of your examination of the documents? A. I did not.

Q. Did Mr. Hickey? A. I don't know.

Q. Weren't you both sitting together? [59] A. Yes. We did not make any notes at the time we were in the office. What he may have written up when he returned to the office I don't know. I was there, I might add, because

of my familiarity with bank records in general, that is basically being an accountant.

Q. Had you been familiarized with the Court's order in respect to this subpoena? You knew the subpoena had been served? A. I knew there was a - I had been told there was a subpoena served.

Q. Had you been told that the Court had taken any further action in regard to this subpoena? A. No, not that particular subpoena.

Q. Sir? A. I was aware of no action in regard to that particular subpoena.

Q. How did it happen that you visited the bank on that day, on Wednesday, this past Wednesday? A. I was asked to do so by superiors in the office.

Q. Would you indicate to the Court what superiors ordered you to do so?

THE COURT: I am losing you, Mr. Reed.

Q. Would you indicate to the Court what superiors ordered you to appear at the bank? [60] A. I'm trying to think. Actually, the instructions I got came from my own supervisor, Thomas J. Honan, and the instructions, and so forth, came from another agent, who is Robert Bowe.

THE COURT: Have we got it clear what the instructions were?

MR. REED: No, sir.

Q. What were the instructions, sir? A. I was told to discuss with the Vice President of the bank means of simplifying the request in the subpoena.

THE COURT: Means of simplifying what?

THE WITNESS: The request in the subpoena. In other words, it was a rather blanket subpoena, and we were trying to narrow down just where our interest might lie.

Q. What criteria was given to you for narrowing your inquiry? A. Well, that is difficult to say. We were looking for certain payments and transactions, which would not occur, say, in some of these other accounts which I eliminated.

Q. Was the criteria limited by the publication of the Pentagon Papers?

MR. BACHMAN: I object, your Honor.

[61] THE COURT: Well, that is a leading question, I suppose. Strike it out.

Q. There came a time then, I gather, that you decided you were interested in some records and not interested in other records? A. That is correct.

Q. Was the subject matter of the Grand Jury inquiry discussed with you?

MR. BACHMAN: I object.

THE COURT: He may answer.

A. Could you clarify that a little, please?

Q. You knew a Grand Jury subpoena had been served on the bank? A. Yes.

Q. Did anyone ever discuss with you the scope of the Grand Jury inquiry? A. Not really. As I say, I am not involved in the investigation or any other matters other than as a kind of accounting advisor, put it that way.

Q. You were given such information so you would know what bank records were relevant and what were not relevant, were you not?

MR. BACHMAN: I object, your Honor.

THE COURT: He may answer.

[62] THE WITNESS: I may answer?

THE COURT: Yes.

A. Yes, sir.

Q. How did you determine that relevancy? A. Well, I knew the things we would be interested in would be transactions in a general account, general operating account.

Q. Relating to what? A. Well, relating to certain of the transactions we might be interested in. I don't quite know how to -

THE COURT: You have gone all the way around the barn without letting us know what kind of barn it was.

THE WITNESS: Well, we were interested in the so-called Pentagon Papers.

Q. In the publication of the Pentagon Papers? A. Right.

Q. Were you interested in any transactions with relation to Senator Gravel?

MR. BACHMAN: I object.

THE COURT: What is the objection?

MR. BACHMAN: I think he has already answered the question, that the Pentagon Papers was the general subject given to him, and that is all there was.

[63] THE COURT: He may answer.

THE WITNESS: I shall answer?

THE COURT: Yes.

A. Yes, sir.

Q. What is your answer, sir? A. Yes, sir.

Q. When is your next appointment with the bank? A. I have none.

Q. When you left the bank what was your understanding as to what would be done? A. That certain of the transactions contained on the account that we had narrowed the thing down to -

Q. That you had identified? A. Yes. In other words, we ended up with two accounts that we would be interested in and some of the backup material to those accounts was going to be prepared for us.

MR. REED: That is all, your Honor.

CROSS EXAMINATION by Mr. Bachman

Q. Mr. Woodring, could you describe the type of document that you or the documents that you examined while you were over there? A. Yes.

[64] What I looked at was bank copies, in some cases photostatic copies, of normal bank statements, the kind everyone would get.

THE COURT: Copies of normal bank statements?

THE WITNESS: Yes, the bank statement that you would get at the end of each month.

THE COURT: By "normal" do you mean typical? I don't know what "normal" means.

THE WITNESS: Yes.

THE COURT: I don't want to put words in your mouth. I am very curious as to the detail of what you were looking at. How detailed was it? How extensive was it?

THE WITNESS: This would be that bank statement that would be very similar or exactly the same really that any individual would get as a statement of his account at the end of the month.

Q. Would you describe the information that these papers or that any one of these papers contained, not specifically but the type of information? For example, did it contain the name of the account? A. Yes.

Q. The account number. A. Right.

[65] Q. Was it a statement of the deposits that were made to that account during a given period of time? A. That is correct.

THE COURT: Like the monthly foldover statement?

THE WITNESS: Yes, sir.

Q. And it was a statement of the amount of the checks drawn? A. That is correct.

THE COURT: Was this a monthly statement?

THE WITNESS: Yes, it was.

THE COURT: How many of them did you look at?

THE WITNESS: I believe they covered from July through October.

THE COURT: Of nine different accounts?

THE WITNESS: I do not recall the exact number of accounts, but I would say somewhere between eight and ten.

THE COURT: Well, if they already had the statements, what were all these items that would have to be prepared?

THE WITNESS: This would be photostatic copies of the individual checks.

THE COURT: So if it just said \$5,280, you didn't know what that was for or who it was to?

[66] THE WITNESS: That is correct, sir.

THE COURT: Thank you.

Q. Did you make or did anyone in the bank make and give you any copies of these statements? A. No, sir.

Q. Did you make any notes of the items that appeared on the statements? A. No.

Q. Did you make any notes as to the various account names or numbers? A. No.

Q. Did you subsequently make any report of any of the information contained in any bank statement or any of the statements which you looked at? A. No, I did not.

Q. To your knowledge did Mr. Hickey? A. Not to my knowledge, no.

MR. BACHMAN: May I have a moment, your Honor?

THE COURT: Yes.

Q. Did you have a conversation with Mr. Gittins as to which accounts you would not be interested in? A. Yes, I did.

Q. About how many of the between eight and ten accounts did you tell him there would be no interest in? [67] A. All of them but two.

Q. Did you make any arrangements with Mr. Gittins to receive in the future any documents from him or from the bank concerning or that might have appeared on the statement or where items might have appeared on the bank statements? A. Yes.

Q. Did you understand the question? A. Maybe I didn't.

Q. Did you make any arrangements to come over and pick up any copies of any documents at a later time? A. In an indirect way, yes. He was going to copy, as I mentioned, some checks, deposit tickets, and so forth, and then notify the office, and at that time we would pick them up.

Q. Have you received any notification from him? A. No.

THE COURT: This is Mr. Gittins?

THE WITNESS: That is correct, sir.

MR. BACHMAN: I have nothing further, your Honor.

MR. REED: That is all, your Honor.

THE COURT: Thank you.

MR. REED: Thank you, Mr. Woodring.

[68] MR. FISHMAN: I don't know what would be involved on the basis of this, your Honor.

THE COURT: A little louder:

MR. FISHMAN: I don't know what would be involved at this point, but on the basis of this testimony we think it

would be important to call Special Agent Hickey in to pursue this line a little further to establish just what he did.

THE COURT: Where is Mr. Hickey?

MR. BACHMAN: I have no idea, your Honor.

THE COURT: When did you last see him?

MR. BACHMAN: I don't believe I have ever seen him.

THE COURT: You, sir?

MR. REECE: Your Honor, I talked with Special Agent Dan Glasgow, I think about 1:30 I talked to him, and I asked him the names of the agents who went to the bank, and he gave them to me, and he said that neither of them was in, that one of them was in the field, I think it was Mr. Hickey, I'm not sure, and I told him to have him call me immediately. I, of course, have not been in my office for some time, and I have had no response with the exception, of course, of Mr. Woodring.

[69] THE COURT: Well, we will take a recess for you to go down and see whether Mr. Hickey is around and available.

MR. REECE: Very well, your Honor.

(Recess.)

(Arguments of counsel.)

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FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1017.

MIKE GRAVEL,
UNITED STATES SENATOR,

Petitioner,

v.

UNITED STATES,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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Supreme Court, U.S.
FILED

FEB 9 1972

E. ROBERT SEAYER, CLERK

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1017

MIKE GRAVEL,
UNITED STATES SENATOR,

Petitioner,

v.

UNITED STATES,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Petitioner, Mike Gravel, United States Senator, respectfully prays that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the First Circuit entered in this proceeding on January 7, 1972, and January 18, 1972, and the amended judgment of that Court entered January 18, 1972.

OPINIONS BELOW

The opinions of the Court of Appeals and the Protective Order (as modified) which was entered are not yet reported and appear in the Appendix hereto. The opinion of the District Court is reported at 332 F. Supp. 930 (D. Mass. 1971).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on January 7, 1972. A timely petition for rehearing was denied on January 18, 1972, and this petition for certiorari was filed by February 10, 1972. The mandate of the Court of Appeals was stayed by Mr. Justice Brennan on January 24, 1972, pending the filing and disposition of the petition for writ of certiorari, provided that filing of the certiorari petition occur on or before February 10, 1972.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the constitutional responsibility of a United States Senator to inform his constituents and colleagues about the workings of government require that his actions in publishing an official, public record of the Subcommittee of which he is chairman, containing documentary information critical of Executive conduct in foreign affairs, be accorded protection as legislative activity under the Speech or Debate Clause?

2. May a Federal Grand Jury at the request of the Executive Branch inquire into and investigate the legislative activities of a Senator by utilizing compulsory process to interrogate persons with whom a Senator dealt and to secure documents, about his planning and executing a Senate Subcommittee hearing and publishing the official record of that hearing?

3. May an otherwise impermissible inquiry be allowed because the legislative activity in question was carried out in a manner deemed by a Federal court to be irregular and contrary to the court's notions of germaneness and of the proper way for the Senate to internally allocate its functions?

CONSTITUTIONAL PROVISION INVOLVED

The Speech or Debate Clause of the Constitution Article I, Section 6, Clause 1, provides:

"... and for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place."

STATEMENT OF THE CASE

This case involves the claim of a United States Senator that the Speech or Debate Clause of the Constitution and the doctrine of Separation of Powers guarantee that he may engage in the unfettered discharge of his legislative privileges and duties without restraint and inquiry by the Executive and Judicial Branches, operating through the Grand Jury. The questions involved in this case are of the highest magnitude and the manner in which they are resolved will have a significant effect upon the ability and willingness of the members of Congress to carry out their legislative duties. The relevant facts giving rise to the issues in this case are as follows:¹

On June 29, 1971, Senator Gravel convened a hearing of the Subcommittee on Buildings and Grounds of the Public Works Committee of the United States Senate. He stated at the outset of the hearings that the conduct of United States foreign policy in Indochina was relevant to his subcommittee, as to practically every subcommittee in the Congress, because of its effect upon the domestic economy and, specifically, the lack of sufficient federal funds to pro-

¹ Due to the expedited schedules which have been set by both the Court of Appeals and by this Court, and transcription delays by the District Court reporter, the complete record of proceedings in the District Court is not yet available for certification. However, as the District Court noted, the facts are not in dispute and have formed the basis of the legal submissions of all parties. 332 F. Supp. at 933 n. 3.

vide for adequate public facilities. During the course of this hearing, Senator Gravel read or inserted into the record portions of the so-called "Pentagon Papers", which examine the causes and history of the conflict in Indochina. In order to make the contents of the Subcommittee record widely available to his colleagues and the electorate, Senator Gravel arranged, without any personal profit to himself, for its verbatim publication by Beacon Press, a non-profit publishing division of the Unitarian Universalist Association.

In August of 1971, a Federal Grand Jury sitting in Boston, Massachusetts, and investigating the release of the Pentagon Papers to the press, subpoenaed Dr. Leonard Rodberg, an aide of Senator Gravel. The Senator moved to intervene and quash the subpoena on the grounds that the purpose of the proposed inquiry of his aide was to investigate his own activity which he asserted was immune from judicial inquiry by virtue of the Speech or Debate Clause. A subpoena was also served upon Howard Webber, Director of Massachusetts Institute of Technology Press, with whom the Senator and his aides had unsuccessfully negotiated for the publication² of the Subcommittee record. During the pendency of the appeal, two subpoenas were served upon officials of Beacon Press but were revoked due to the stay in effect.

The District Court granted the motion to intervene, and found, *inter alia*, that "the Government's interest in [Dr. Rodberg's] testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." 332 F. Supp. at 933. The Court denied the motion to quash Dr. Rodberg's subpoena, but

²The publication by Beacon Press has variously been referred to in the opinions and papers below as the "publication" and as the "republishing." Inasmuch as the Beacon Press edition was the first occasion on which the Subcommittee record was printed after its compilation, we use the term publication.

issued a Protective Order barring inquiry of any witness into Senator Gravel's actions in holding the hearing and in preparing for it. The Court held, however, that the verbatim publication of the record "stands on a different footing" and is not protected by the legislative privilege. *Id.*, at 936-37. With respect to the Webber subpoena, the Government conceded in oral argument that its primary reason for calling him was to question him about conversations with the Senator's aides; the subpoena itself demanded production of all notes relating to Dr. Rodberg and the Pentagon Papers. Intervention was also allowed in this matter, but the motion to quash Webber's subpoena was denied.

Senator Gravel appealed to the United States Court of Appeals for the First Circuit, and the Government cross-appealed.³ The Court of Appeals' opinion of January 7, 1972, noted that "important questions as to the extent of the legislative privilege" were raised by the appeal (App. 2A). The Court of Appeals concluded that Senator Gravel "has essentially lost his appeal," and affirmed the judgment of the District Court and entered a modified Protective Order (App. 13-15A). The Court held that the constitutional privilege of the Speech or Debate Clause did not extend to Senator Gravel's exercise of the informing function in publishing the Subcommittee record and therefore did not bar grand jury investigation into, for example, the Senator's communications with Webber and Beacon Press. The Court also held that the Grand Jury in conjunction with the Executive could interrogate all persons other than the Senator's

³ There was jurisdiction over the appeal under 28 U.S.C. § 1291, because Senator Gravel had no other means of obtaining review and consequently the denial by the District Court of his motion to quash was, as to him, a final appealable order. *Pelzman v. United States*, 247 U.S. 7 (1918). See *United States v. Ryan*, 402 U.S. 530, 533 (1971). The Court of Appeals therefore properly held that it had jurisdiction over the appeal (App. 3A). Similarly, this Court has jurisdiction.

aides about his actions in preparing for the Subcommittee hearing, as long as the questioning was not directed to the Senator's motives for holding the hearing.

The Court of Appeals issued a subsequent opinion denying a motion for reconsideration, in which it suggested that ordinary publication of a Subcommittee record might enjoy constitutional immunity but that the publication in question did not because it was done "privately" and because the Subcommittee had "no conceivable concern" with the documents entered into the record (App. 2C).

REASONS FOR GRANTING THE WRIT

The issues which are presented for review are ones of first impression which have not but which must be decided by this Court. These are issues which must be faced and resolved definitively sooner or later, and this is an appropriate and indeed urgent case. What is now before the Court is a classic Separation of Powers problem, and if not decided here and now, it might lead to an embarrassing and perhaps dangerous confrontation between the Legislative Branch on the one hand and the Executive and Judicial Branches on the other. A United States Senator has squarely and clearly raised a claim that his privileges and protections under the Speech or Debate Clause have been infringed by a Grand Jury inquiry, led by the Executive Branch, into his activities and those of his aides and associates in carrying out his duty of informing his colleagues and the electorate about acts committed by the Executive and, specifically, with respect to Executive conduct in foreign relations.

Despite the fact that the Speech or Debate Clause must be, and has by this Court been, "read broadly to effectuate its purposes," *United States v. Johnson*, 383 U.S. 169, 180 (1966), the Court of Appeals has effectively denied the applicability of the Clause to the informing function of Congress. The Court thus permitted the Grand Jury to investigate into Senator Gravel's exercise of the informing

function through the interrogation of "third parties"⁴ such as Howard Webber and the Beacon Press, with whom the Senator dealt in order to publish and disseminate the Subcommittee record to his colleagues, constituents, and to the public at large. Far from being a broad reading of the privilege, this reading so restricts the scope of the Senator's privilege that it makes it impossible (or, to be more precise, dangerous) for a member of the Senate or the House to enlist the assistance necessary in order adequately to perform his legislative task of informing his constituents and colleagues about vital matters concerning the operations of government. It is this informing function of a member of the Legislative Branch which this Court has viewed as his most important task:

"We are not concerned with the power of Congress to *inquire into and publicize* corruption, maladministration and inefficiency in agencies of the government. This was the only kind of activity described by Woodrow Wilson in *Congressional Government* when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' *Id.*, at 303. *From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature.* See Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 168-194. *Watkins v. United States*, 354 U.S. 178, 200, fn. 33 (1957) (emphasis added).

⁴The Court of Appeals, admitting that "the court is not in total agreement" on this point, nevertheless "presently" held that the Senator and his aides could not personally be questioned as to "republishing," "without binding ourselves for future purposes." (App. 11A). More exactly, the Court of Appeals found that the Speech or Debate Clause privilege did not extend at all to the "republishing," but that the Senator and his aides may be protected from direct interrogation by a common law privilege (App. 10-11A).

As much as speaking on the floor and voting, the informing function is an inherent part of the legislative process in representative government:

[The Congressman's] duty is to acquire [knowledge about administration], partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. The electorate demands a presentation of the case . . . The very fact of representative government thus burdens the legislature with this informing function . . .

. . . That duty, however, is not distinct from the legislative process, but implied and inherent in it. Landis, *supra* at 205-06 & n. 227.

This Court has consistently emphasized that the Speech or Debate Clause immunizes from judicial inquiry "legislative acts of . . . [a] member of Congress [and] his motives for performing them," *United States v. Johnson, supra* at 185. This standard has been variously expressed to encompass conduct which is "related to the due functioning of the legislative process," *id.* at 172, or "in the sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), or "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourne v. Thompson*, 103 U.S. 168, 204 (1881). Far from indulging in "catch-phrases" (App. 8A), this Court has but recognized that the history and policy of the Clause can be satisfied only by a broad standard that immunizes a Member of Congress for actions taken in the discharge of his obligations as a representative of the electorate and prevents intimidation and harassment by a possibly hostile Executive and Judiciary. It is for this reason that other legislative activities, such as obtaining material for committee hearings, *Dombrowski v. Eastland*, 387 U.S.

82 (1967), conduct at the hearings, *Tenney v. Brandhove*, *supra*, and committee resolutions and votes, *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969), have been held entitled to protection. We think it evident that in our system of representative government, where "[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them," *Bond v. Floyd*, 385 U.S. 116, 136 (1966), direct communication by a Senator to the electorate through the publication and distribution of committee reports, is legislative activity which is entitled to like protection.⁵

⁵See Woodrow Wilson, *Congressional Government* (1885):

The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration . . . (at 303).

Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body [Congress] which kept all national concerns suffused in a broad daylight of discussion (at 297).

Even if, as the Court of Appeals believes, focus should be confined exclusively to Congress' deliberative processes—which we submit is too narrow a view—it is clear that the colloquy between a congressman and the electorate is a prime determinant in influencing him in his decisions on pending legislation. The Court of Appeals did not rebut this argument, but rejected its consequences as "staggering," with reference to speculative examples of virtually unimaginable abuses (App. 10A, particularly n. 9). Identical "parade of horrors" arguments have been consistently rejected by this Court, even when the possibility of abuse was much less speculative. See, e.g. *Barr v. Matteo*, 360 U.S. 564, 576 (1959).

The issue of the degree to which the informing function of Congress is encompassed within the scope of the Speech or Debate Clause is presented herein with striking clarity. What is now, before this Court is a classic separation of powers case. There is no claim here, in contrast to some civil cases, that a Member of Congress used the authority of his office to violate willfully an individual's constitutional rights. That kind of situation draws into play the obligation of the Courts to protect individual rights, and there may very well be circumstances where no other means is available to safeguard the preferred constitutional rights of the individual, and where the judiciary will therefore be compelled to draw the balance on the side of the individual. Cf. *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970).

In this case, on the other hand, the judiciary is not being asked to balance the rights of individuals, including preferred constitutional rights, against the privileges of Members of Congress; to the contrary, the Executive Branch of government has come to the courts and claimed that it may determine what a Member of Congress may tell his constituents about matters of overwhelming public concern. It is no exaggeration to say that this claim challenges the fundamental character of our tripartite system of government.

The Executive's contention that it may investigate and indeed prosecute for the publication of legislative proceedings flies in the face of the historical purposes of the Speech or Debate Clause. The Clause was drafted to secure absolute freedom of speech for Members of Congress. It was the end product of a lineage of legislative free speech guarantees from the English Bill of Rights of 1689 to the first State constitution and the Articles of Confederation. See generally *Tenney v. Brandhove*, *supra* at 372-75. None of these provisions drew a distinction between a speech of a legislator directed at his colleagues and one to his constituents. On the contrary, the Court in *Tenney* stated that the Clause was designed to protect both. *Id.*, at 377 and fn. 6. This is consistent with no less an authority than Thomas Jeffer-

son. When a Federal Grand Jury protested against abuses by Congressmen who disseminated slanderous accusations to the public, Jefferson responded that the framers of the Constitution wrote the Speech or Debate Clause to allow Congressmen to inform the electorate without inhibition:

... that in order to give to the will of the people the influence it ought to have, *and the information which may enable them to exercise it usefully*, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive

That . . . for the Judiciary to interpose in the legislative department between the constituent and his representative, *to control them in the exercise of their functions or duties towards each other*, . . . to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary . . . is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be . . . ; *and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive.* 7 *Writings of Thomas Jefferson* 158 (Ford ed. 1898), quoted in Luce, *Legislative Assemblies* 516-18 (1924) (emphasis added).

The privilege must be read to protect the publication and public distribution of speeches and committee records. This is a principal avenue relied upon by Members of Congress to provide the people with "the information which may enable them to exercise [their will] usefully."

The Constitutional evil which would result from denying the privilege's applicability to the informing function of Congress is magnified when this is done at the behest of

the Executive and with respect to material which is critical of executive behavior. As this Court has emphasized, the central purpose of the Speech or Debate Clause is "to prevent intimidation by the Executive and accountability before a possibly hostile Judiciary."⁶ *United States v. Johnson*, *supra* at 181. If the Executive Branch may, at will, institute Grand Jury proceedings and interrogate witnesses about Senators' publications of their speeches and committee reports which they send to the electorate, it will possess the power to isolate effectively all but the most courageous legislators from their constituents.⁷ If such a rule applies, Congressmen will have to watch what they say to the people—in press releases, newsletters and anything spoken outside of the four walls of the Capitol—and they will inescapably be inhibited out of fear of harassment, Grand Jury inquisitions and even prosecutions. Yet if the Speech or Debate Clause means anything, it is that courts and prosecutors are not referees over what Congressmen may say to the people or how they may say it.⁸

⁶One of the most notorious events crystalizing the struggle for the Parliamentary privilege was the vindictive action of Charles I against Sir John Eliot and other Members of Parliament who vocally opposed funding a needless and bloody war overseas. 3 How. St. Tr. 294, 332. See *Tenney v. Brandhove*, *supra* at 372.

⁷Compare Woodrow Wilson, *Congressional Government* (1885), at 303:

It is the proper duty of a representative body to look diligently into every affair of government *and to talk much about what it sees*. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; *and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct* (emphasis added).

⁸See II *Works of James Wilson* (Andrews ed., 1896) at 38:

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest

The proper rule of Constitutional law was stated in *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729, 731 (D.D.C. 1956) (three-judge court):

Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement.

The Court of Appeals placed reliance upon two early English cases⁹ holding publication of legislative proceedings outside the Parliamentary privilege. This reliance is decidedly misplaced, for their underpinning has been repudiated and their holding has not survived. These cases had their genesis in a politically-motivated prosecution of the Speaker of the House of Commons, *Rex v. Williams*, 2 Show. K.B. 471, 89 Eng. Rep. 1048 (1794), and this decision was later declared to be "a disgrace to the country," *Rex v. Wright* 8 T.R. 293, 101 Eng. Rep. 1396 (King's Bench, 1799). At least since *Wason v. Walter*, L.R. 4 Q.B. 73 (1868), the settled law in England is that the Parliamentary privilege protects a member who publishes a speech "for the information of his constituents," and that the privilege applies derivatively to the publisher, because "such publication . . . is essential to the working of our Parliamentary system, and to the welfare of the nation." *Id.*, at 95. There is no reason in history or policy why the privileges of elected representatives in the United States should not be at least equal to those of their counterparts in England.

liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense.

This Court has made it abundantly clear that the "powerful" of whom Wilson spoke, refers primarily to the Executive Branch. *United States v. Johnson*, *supra* at 180-81.

⁹*Rex v. Abington*, 1 Esp. 226, 170 Eng. Rep. 337 (1795); *Rex v. Creevey*, 1 M. & S. 273, 105 Eng. Rep. 102 (1813).

The confusion which was endemic in British law before final resolution by the highest court of England is now mirrored in our own country in conflicting decisions of the lower Federal courts. There are *dicta* in two prior cases which are consistent with the holding of the First Circuit. *Long v. Ansell*, 69 F.2d 386, 389 (D.C. Cir. 1934); *McGovern v. Martz*, 182 F. Supp. 343 (D.D.C. 1960).¹⁰ On the other hand, there are two decisions which hold that the Speech or Debate Clause affords complete protection to Congressmen who publish committee records. *Hentoff v. Ichord*, *supra*; *Methodist Federation for Social Action v. Eastland*, *supra*.¹¹ Furthermore, the holding of the First Circuit conflicts in principle with the decision of the District of Columbia Circuit in *Hearst v. Black*, 84 F.2d 68 (D.C. Cir. 1936). This was an action to enjoin members of a Senate subcommittee chaired by then Senator (later Justice) Hugo L. Black from keeping, reproducing and distributing to his colleagues and to the public, documents which were alleged to have

¹⁰ *Long* was not even a Speech or Debate Clause case; it involved a claim of a Senator that he was immune from service of process because of the privilege from arrest in Article I, Section 6. The only reference to the Speech or Debate privilege was in a brief final paragraph. On review, the Supreme Court did not refer to the Speech or Debate Clause. 293 U.S. 76 (1934). In *McGovern*, the comments on "republication" were *dicta* because there was no publication except in the *Congressional Record*.

¹¹ The Court below distinguished these cases because they involved requests for injunctive relief to prevent the publication of defamation, which "although actionable, may not be enjoined" (App, 8A). Yet in neither case is there so much as a hint that this factual distinction entered into the decision. Moreover, *Hentoff* was not a defamation case; the plaintiffs sought relief on First Amendment grounds. The court held that the Speech or debate Clause deprived it of jurisdiction to consider a complaint "seeking any remedy" against the Congressmen for publication, 318 F. Supp. at 1179, and the court indicated quite clearly that the only reason it had jurisdiction to grant any relief against the Public Printer was because the publication would infringe the protected First Amendment rights of the plaintiffs. *Id.* at 1180.

been obtained illegally. The court dismissed the complaint on principles of separation of powers.

The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of the appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongly exercised, is not a subject for judicial interference.

The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. *Id.*, at 71-72.

The recurring nature of this issue and the conflicting decisions in the lower courts are additional reasons for this Court to clarify the extent of the Congressional privilege. A clear decision by this Court is necessary so that Members of Congress, who routinely inform their constituents by issuing press releases and by circulating copies of their speeches and committee reports and records, will know precisely what their rights are. Similar considerations led this Court to take review in *Barr v. Matteo, supra*, and *Howard v. Lyons*, 360 U.S. 593 (1959), and to hold that the judicially-created doctrine of executive privilege protects the issuance and circulation of news releases by the thousands of subordinate officials of the Executive Department. The Court of Appeals has not explained why the constitutional privilege of elected Members of Congress should be narrower.

Perhaps out of recognition that its holding was at odds with the thrust of prior decisions of this Court and was inconsistent as well with the history and policies underlying the Speech or Debate Clause, the Court of Appeals suggested that ordinary publication of committee reports might well be constitutionally protected but that this particular instance was not. This was implied in the initial decision¹² and stated beyond doubt in the second opinion (on rehearing), where the Court of Appeals "dr[ew] a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of, we must presently assume, lawfully classified documents, through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern" (App. 2C).

The clarifying language in the opinion on rehearing indicates clearly that the Court of Appeals has thus taken upon itself the power of determining whether or not a procedure followed by a Senator in the performance of his legislative functions is sufficiently "regular" so as not to divest his protection under the Speech or Debate Clause. In so doing the Court of Appeals has departed drastically from settled principles. Even the District Court recognized in its Opinion that "[t]he courts have no right to dictate . . . the procedures for Congress to follow in performing its functions . . .", and that "[j]udging the applicability of the legislative privilege in the exercise of the functions of the legislator's office should be done 'without inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules,'" 332 F.Supp. at 936. How a House of Congress internally allocates its functions

¹²"We will not hold that there is a constitutional privilege to print privately what, we must assume for present purposes, were classified documents simply because intervenor [Senator Gravel] had first disclosed them to a Senate subcommittee whose function was totally unrelated thereto" (App. 10A).

and prescribes and enforces its procedures is a political question, which is beyond the cognizance of the courts.¹³ The judiciary has no more authority to tell a Senator what is germane to the subcommittee which he chairs than to adjudicate the current jurisdictional dispute between the Foreign Affairs and Armed Services Committees.

It is equally clear that there is nothing in the nature of "private" publication which may defeat the privilege. Technological developments in printing have so persuaded Congressmen and other public officials to utilize private facilities to disseminate reports and records in order to obtain the cheapest and most widespread distribution that it is now a dominant mode of publication. This Court may take judicial notice of the fact that, for example, every important commission report over the last decade has been printed privately,¹⁴ as have transcripts of significant Con-

¹³Of course, as with other variants of the political question doctrine, when a committee infringes upon an individual's constitutional rights, the courts may be obliged to examine enabling legislation in order to determine whether there is an overriding governmental interest. *E.g.*, *Watkins v. United States*, 354 U.S. 178, 205 (1957). Here, no such claim is made by the Government; and the matter is "peculiarly within the realm of the legislature." *Ibid.* See also *Yellin v. United States*, 374 U.S. 109, 121-22 (1963), which drew this distinction precisely.

¹⁴See *Violence in America: Historical & Comparative Perspectives* (Graham and Gurr, et als., Task Force on Historical & Comparative perspectives, Report to the National Commission on the Causes and Prevention of Violence) (New American Library, N.Y. 1969); *To Establish Justice: To Insure Domestic Tranquility* (National Commission on the Causes and Prevention of Violence, introd. by Reston) (Bantam Books, N.Y. 1970) ("Eisenhower Commission Report") (also published by Award Books, N.Y. 1969); *The Challenge of Crime in a Free Society* (President's Commission on Law Enforcement and Administration of Justice, introd. by Silver) (Avon Books, N.Y. 1968); *Rights in Conflict: The Violent Confrontation of Demonstrators and Police in the Parks & Streets of Chicago During the Week of the Democratic Convention of 1968* (Report to the National Commission on the Causes and Prevention of Violence, introd. by Max Frankel) (E.P. Dutton & Co., N.Y. 1968) ("The Walker Report") (also published by New American Library, introd. by Donovan, N.Y.

gressional committee hearings.¹⁵ And even before this development became so pronounced, the Public Printer, who is after all distinguished only by being subsidized by the taxpayer, has not had a status at all different, under either American or English Law, from private printers who publish legislative proceedings.¹⁶

By making the applicability of the privilege for publication turn upon judgments of "germaneness" and "regularity", the Court of Appeals has hardly provided a limiting principle. It has, to the contrary, supplied yet more uncertainty, for the privilege is "of little value", if Congressmen must depend upon the way of a court or jury later speculates upon such amorphous concepts. See *Tenney v. Brandhove*, *supra* at 377.

Finally, the consequences of the decision of the Court of Appeals are not ameliorated by the fact that Senator Gravel and his aides will not personally be questioned before the Grand Jury. In allowing the interrogation of "third parties" into the legislative activities of a Congressman, so long as his "motives" are not attacked, the Court of Appeals misapprehended the holding of *United States v. Johnson*, *supra* at 173-76, where this Court barred inquiry

1968); *Report by the U.S. National Advisory Commission on Civil Disorders* (Bantam Books, N.Y. 1968) ("The Kerner Commission Report"); *Report of the Commission on Obscenity and Pornography* (introd. by Barnes, Bantam Books, N.Y. 1970).

¹⁵See, e.g., Senate committee hearings, republished as *The Vietnam Hearings* (copyright and introd. by J. W. Fulbright) (Random House, paperback ed. Vintage Books), N.Y. 1966).

¹⁶See *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180 (D.D.C. 1970); The Parliamentary Papers Act, §§I and II (3 & 4 Vict., c. 9 (1840)); *Wason v. Walter*, 4 Q.B. 73 (1868). It should be noted that in this case, Beacon Press made its paperback edition available to the public in sufficient quantity at a price of \$20. for the set, while the Government Printing Office made available a limited printing of a censored edition, with unnumbered pages (making the work less useful as a research and reference tool) at a price of \$50.

of anyone not only into motives but also into *how* the speech was prepared and into its precise ingredients. The rationale of the Court of Appeals affords little, if any, protection to Congressmen, for in the course of their legislative activities they of necessity deal with innumerable people,¹⁷ and questioning of them before the Grand Jury may accomplish by indirection precisely what the Court of Appeals recognized could not be done directly—the intensive breach of the sanctity of the legislative process. The Executive, with the assistance of the Grand Jury may, under this decision, investigate how a Congressman wrote a speech; what materials were in his possession, his conversations prior to voting or speaking out on controversial issues, how he prepared for a hearing, and how he made his speeches, reports and hearings available to his constituents—so long as the interrogators disclaim any intent to attack his motives. Aside from the clear violation of separation of powers thus effectuated, the intimidating potential of this approach and its possible effects on Congressional deliberations are awesome.

And surely there is nothing unique about the Grand Jury which justifies such a holding. Other investigative bodies, of at least equal stature and importance, have not been permitted to proceed unchecked when their investigations were perceived to have a similar impact upon First Amendment freedoms. See, e.g., *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825 (1966), and cases cited therein at 829. There is no reason why the Grand Jury, which is subject to the supervisory powers of the Federal Courts, should not be governed by like restrictions when it intrudes into an area of prime constitutional importance.

¹⁷It is difficult to imagine, for example, a Congressman being able to perform the informing function without the assistance of "third party" printers. Questioning Webber and Beacon Press officials about how Senator Gravel published the Subcommittee record would disclose precisely the same information about his legislative activities as if he and his aides were called.

CONCLUSION

Only six years ago, in but the third case dealing with the Speech or Debate Clause decided by this Court, Mr. Justice Harlan observed that "[i]n part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause." *United States v. Johnson*, *supra* at 179. Since then, the Court has been obliged to take review three more times.¹⁸ An important provision of the Constitution, adopted at the Convention without debate and viewed as axiomatic for most of our history, is now the center of controversy and doubt. This is an appropriate case for this Court, as the ultimate interpreter of the Constitution, to enunciate definitively the extent of the Congressional privilege.

¹⁸ *Dombrowski v. Eastland*, *supra*; *Powell v. McCormack*, *supra*; *United States v. Brewster*, No. 1025, jurisdiction postponed 401 U.S. 935, No. 70-45 (restored to the calendar for reargument) ___ U.S. ___, 40 U.S.L.W. 3351.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinions of the Court of Appeals for the First Circuit.

Respectfully submitted,

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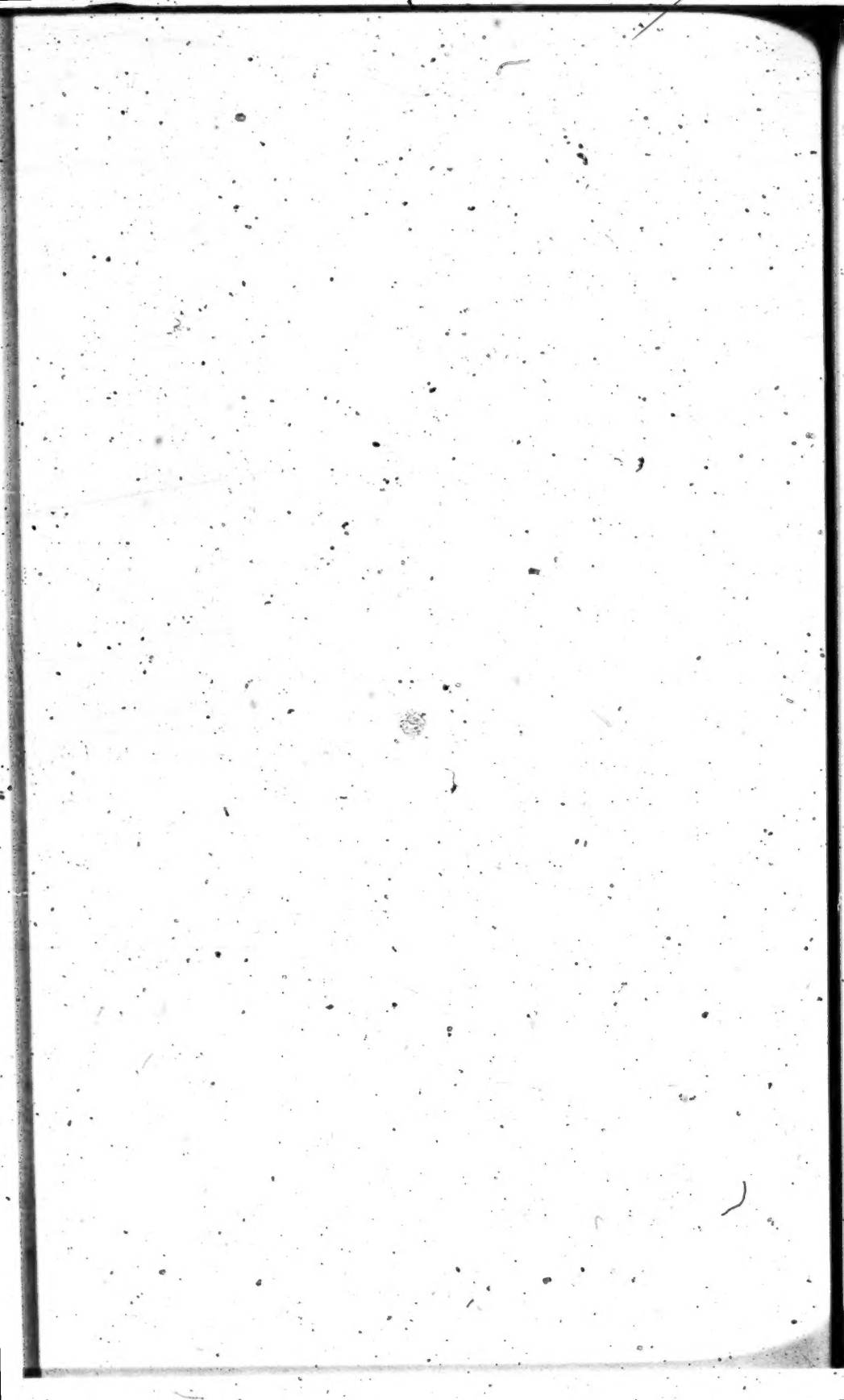
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APPENDIX A
IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331
and 1332

UNITED STATES OF AMERICA

v.

JOHN DOE

MIKE GRAVEL, UNITED STATES SENATOR
INTERVENOR, APPELLANT

No. 71-1335

UNITED STATES OF AMERICA,

APPELLANT,

v.

JOHN DOE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

David R. Nissen, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, and *Warren P. Reese*, Assistant United States Attorney, were on brief, for the United States.

Robert Reinstein and *Herbert O. Reid, Sr.* with whom *Charles L. Fishman* was on brief, for Mike Gravel, United States Senator.

Doris Peterson, *Peter Weiss*, *James Rief*, and *Morton Slaris* on brief, for Leonard Rodberg, Amicus Curiae in case No. 71-1335.

January 7, 1972

ALDRICH, *Chief Judge*. These cross appeals raise important questions as to the extent of the privilege afforded by the Speech or Debate clause of the Constitution. This clause, the separate and concluding part of Article I, Section 6, Clause 1, provides that "... for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The issues arise in the context of a motion to limit the testimony that can be presented to a federal grand jury. The facts are these.

A copy of classified Defense Department documents, now widely known as the Pentagon Papers, containing hitherto unpublished facts concerning the background and conduct of the Vietnam War, found itself, unauthorizedly, in the hands of Senator Gravel, the junior senator from Alaska. The Senator was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He called a meeting of the subcommittee, read to it a summary of the high points, and then introduced the entire Papers, allegedly some 47 volumes and said to contain seven million words, as an exhibit. Thereafter, he allegedly supplied a copy of the Papers to the Beacon Press, a Boston publishing house, owned by the Unitarian-Universalist Society, for publication.

These matters and the events preceding them have attracted the attention of a grand jury in the Massachusetts District. The court found, "The crimes being investigated by the grand jury include the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371)." (Strictly, the court misused the word "public.")

Among other summoned witnesses were Leonard S. Rodberg, a legislative assistant to Senator Gravel, and Howard Webber, director of M.I.T. Press. Rodberg objected to testifying, on the ground of invasion of his First Amendment rights of freedom of association and freedom of the press,

and in addition, on the ground that as a legislative assistant to the Senator, he is protected by the Speech or Debate clause. The Senator himself has not been called, and the Department of Justice has stated that it has no intention of calling him. The court, however, permitted the Senator to intervene in the proceedings for the purpose of arguing that his own privilege under the Speech or Debate clause requires that the subpoenas issued to Rodberg and Webber be quashed, and that a protective order be issued suppressing certain other testimony. The resulting order the Senator, as the present appellant, finds too limited, and the government, as cross-appellant, too broad.

JURISDICTION

The government, correctly, points out that if the subpoena that was sought to be quashed was directed to intervenor, there could be no appeal from the refusal to quash unless he took the further step of refusing to comply, and was adjudicated in contempt. *Cobbledick v. United States*, 1940, 309 U.S. 323; *United States v. Ryan*, 1971, 402 U.S. 530. Here, however, the subpoena was not addressed to intervenor, but to third parties, who could not be counted on to risk contempt in order to protect intervenor's constitutional rights. See *United States v. Ryan*, ante, at 533. Hence he was "powerless to avert the mischief of the order" unless permitted to appeal it. *Perlman v. United States*, 1918, 247 U.S. 7, 13. The government's effort to take the case outside the *Perlman* exception, by arguing that intervenor will not suffer irreparable injury if the grand jury hears the evidence, assumes the correctness of its claims that no injury is cognizable unless and until intervenor is indicted. *Perlman*, however, illustrates that, to the contrary, a court, in determining whether an intervenor will suffer irreparable injury unless allowed to appeal, should assume his claim to be correct. We hold, therefore, that the order denying intervenor's motion is appealable.

THE ISSUES

The court's order, so far as presently material, provided as follows.

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

This order was preceded by a comprehensive recitation of facts, some of which we do not repeat, and discussion of the legal principles. *United States v. John Doe, In re Rodberg*, D. C. Mass., 1971, 332 F. Supp. 930. By a subsequent order the court refused further relief, except for a brief temporary stay, which we extended.

The response of both parties is extreme. Intervenor's brief suggests that the entire inquiry is improper.

"There probably is no clearer case of the prostitution of the grand jury process than is daily evidenced [here] This Court is thus presented by the government with a flagrant misuse of the subpoena power of the grand jury . . . [by the executive]. This represents a fundamental perversion of the function of the grand jury. . . ."

The government does not make the rejoinder that intervenor's own action in disclosing documents which were, in his own words, "critical of Executive conduct in foreign affairs," had no conceivable relevance to the functions of

the Subcommittee on Public Buildings and Grounds; a matter which would seem self-evident.¹ While recognizing that that claim would be (at least largely, see post) irrelevant, it does take the extreme position that while legislators may not be questioned "for" their speech or debate, in the sense of being held accountable, they may be freely questioned "about" them.

"SPEECH OR DEBATE"— THE SCOPE OF THE PRIVILEGE

The areas in which intervenor objects to questioning are three—speech or debate itself, or publication; preparation, or pre-publication, and, finally, republication. We will consider them in that order.

a) *Publication*

For what he says or does on the floor of the Senate, or before the subcommittee, intervenor is concededly protected by an absolute privilege from all criminal and civil liability. See *United States v. Johnson*, 1966, 383 U.S. 169; *Tenney v. Brandhove*, 1951, 341 U.S. 367. It is equally clear that this protection extends to any written reports of the committee proceedings addressed to Congress, including material unspoken at the hearing but inserted directly into the record. See *Kilbourne v. Thompson*, 1880, 103 U.S. 168, 204; *McGovern v. Martz*, D.D.C., 1960, 182 F. Supp. 343, 347. The privilege protects against a claim of irrelevancy, see *Cochran v. Couzens*, D.C. Cir., 1930, 42 F.2d 783, 784, as well as of falsity and malice. The government would argue that intervenor could be questioned "about" his conduct for this very reason, drawing the analogy that one who is

¹ Nor does the government point out that intervenor, although relying elsewhere on the public's "right to know" (see n. 5, post) basically is seeking to block exposure of how he exposed what, in turn, the Executive did not wish to have exposed.

immune from prosecution cannot claim the protection of the Fifth Amendment.

In our view this misconceives the scope and purpose of the Speech or Debate clause, which is not principally to protect the person and pocketbook of legislators, but, rather, is to ensure freedom of debate. *United States v. Johnson*, ante, at 180-82. Intimidation of a legislator, harassment, embarrassment with the electorate, all may be achieved short of obtaining a criminal or civil judgment. Cf. *United States v. Johnson*, 4 Cir., 1964, 337 F.2d 180, 191, *aff'd*, 383 U.S. 169. Since these consequences can flow from mere inquiry, the possibility of judicial inquiry could itself serve as an effective deterrent to speaking out against executive policy, *Id.* Further, although it seems to us relatively less important, the time required to respond to such an inquiry would be inconsistent with another purpose of the Speech or Debate clause, which is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks." *Powell v. McCormack*, 1969, 395 U.S. 486, 504; see *Tenney v. Brandhove*, ante, at 377. We cannot accept the government's distinction between questioned "for" and questioned "about."² Nor do we think that the place of questioning, whether it be before the grand jury or before a petit jury, determines its palatability. The legislator need not answer questions anywhere.

b) Pre-publication

Turning to the pre-publication period, we note that we are concerned not with whether a legislator may be protected from prosecution for illegal conduct in obtaining information for use in a congressional proceeding, but only

²On the other hand, while we are discussing terminology, except insofar as his hyperbole quoted ante may so suggest, we do not believe *intervenor* contends that his constitutional protection against questioning means that the government cannot prove aliunde wrongful acts by others which, by implication, may bring his own conduct "into question." There could be no merit in such a claim.

with the extent to which the constitutional privilege bars grand jury questioning. Different considerations may well apply. Effective debate presupposes access to facts. See generally Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate; Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suffolk L. Rev. I, 36 (1968). Since the scope of the privilege should be as broad as is necessary to achieve its purpose of assuring full and free debate, see *Stockdale v. Hansard*, 1839, 9 Ad. & E. 2, 150, 112 Eng. Rep. 1112, 1169, we include therein inquiries which would restrict acquisition of information. It seems manifest that allowing a grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them. Cf. *Caldwell v. United States*, 9 Cir., 1970, 434 F.2d 1081, cert. granted 402 U.S. 942. Whatever the accommodation that must be made with respect to the public interest in prosecuting crime, cf. *Dombrowski v. Eastland*, 1967, 387 U.S. 82, we cannot accept that it is to be drawn in favor of permitting direct inquiry of a legislator.³ To what other persons this protection may extend we will consider later. All government action cannot be frozen in the name of chilling speech. Cf. *United States v. O'Brien*, 1968, 391 U.S. 367.

c) Republication

Intervenor in his appeal contends that the clause comprehends not only the delivery of a congressional speech and conduct antecedent thereto, but also conduct subsequent to the speech aimed at its wider dissemination, including private republication. Apart from republication such as in the news media or the Congressional Record, which is the

³In *New York Times v. United States*, 1971, 403 U.S. 713, the Court accommodated related free speech interests in holding that the newspaper's conduct could not be enjoined, although, as pointed out in Mr. Justice White's concurring opinion, it may have been criminal. *Id.*, at 730-41.

natural consequences of a speech and is necessarily protected, see *McGovern v. Martz*, ante, at 347; no American court appears to have decided this question.⁴ But cf. *id.*; *Long v. Ansell*, D.C. Cir., 1934, 69 F.2d 386, 389, *aff'd*, 293 U.S. 76. In urging us to resolve it in his favor, intervenor acknowledges that it will not affect his freedom to speak, since the speech has already been made, but argues that republication is essential to the "due functioning of the legislative process," *United States v. Johnson*, ante, 383 U.S. at 172; and is "generally done" by members of Congress.⁵ *Kilbourne v. Thompson*, ante, at 204. See also *Stockdale v. Hansard*, ante, at 150, 1169. The difficulty is that the term "legislative process" is no more self-defining than "Speech or Debate." The language and history of the Speech or Debate clause is a surer guide to the scope of the privilege than catch-phrases, and we find in both a focus upon mat-

⁴We put to one side cases refusing an injunction, as involving different considerations. See *Hentoff v. Iehord*, D.C.C. 1970, 381 F. Supp. 1175; *Methodist Federation for Social Action v. Eastland*, D. C.C., 1956, 141 F. Supp. 729; cf. *New York Times v. United States*, n. 3 ante. In the more common situation, it has long been settled that the publication of defamation, although actionable, may not be enjoined. E.g., *Crosby v. Bradstreet Co.*, 2 Cir., 1963, 312 F.2d 483, 485, *cert. denied* 373 U.S. 911; *Kidd v. Horry*, C.C. E.D.Pa., 1886, 28 F. 773.

⁵"The Framers presuppose[d] the maximum amount of communication between the citizens and their elected representatives."

"The people must be informed fully of the workings of government."

"The heart of representative democracy is the communicative process between the people and their agents in government."

"Informing the electorate is a 'legislative act' since it is clearly 'related to the due functioning of the legislative process.' *United States v. Johnson*, *supra* at 172. In fact, it is not exaggeration to say that direct communication between a Member of Congress and the electorate is an essential bedrock of the legislative process, for it insures that the people will inform him and his colleagues [sic] of their well-considered views on pending and future legislation—an indispensable prerequisite for each Congressmen deciding how to cast his own vote."

ters occurring in the course of deliberation. This had been the English concept upon which our privilege had been patterned.⁶ Two English cases, decided shortly after the enactment of the American constitution, held that the parliamentary privilege did not immunize members from civil liability for libels contained in privately published reproductions of their parliamentary speeches. *Rex v. Creevey*, 1813, 1 Maule & Selwyn 273; *Rex v. Lord Abington*, 1795, 1 Esp. N.P. Cases 228. See generally T.E. May, *Treaties on the Law, Privileges, Proceedings and Usage of Parliament* 48-66 (16th ed. E. Fellowes & T.G.B. Cocks 1957); C.F. Wittke, *The History of English Parliamentary Privilege* 23-32 (1921). Our courts have expanded the privilege beyond the act of debating within Congress a proposal before it only when necessary to prevent indirect impairment of such deliberations. See *Kilbourne v. Thompson*, ante; *Coffin v. Coffin*, 1808, 4 Tyng (Mass.) 1.

We do not find private republication within that category. The fact that it may be customarily done by members of Congress is not the answer.⁷ Only those acts by which a congressman ordinarily expresses to the House his views on matters before it come within the Supreme Court's extension of the privilege to "things generally done . . . in relation to the business before [Congress]." *Kilbourne v. Thompson*, ante, at 204. (Emphasis supplied)

Intervenor's argument that communicating with the electorate is essential to effective deliberation because it elicits responses to guide legislative decisions and because it

⁶"[I]t may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source." *Kilbourne v. Thompson*, ante; at 202.

⁷Cf. *United States v. Johnson*, ante, at 172. There the Court observed that an attempt to influence the Department of Justice in favor of a constituent was unprotected, yet assisting constituents is just as customary a function as communicating with them. See generally V.O. Key, *Politics, Parties and Pressure Groups* (3d ed. 1952); R. Davidson, *The Role of the Congressman* 99 (1969).

helps to put pressure upon other legislators (n. 5, ante, ¶4) proves too much. If accepted, it would bring within the privilege not only republished congressional speech, but speeches delivered anywhere. But even restricted to repeating what has once been said in a legislative context, the consequences of an unlimited absolute privilege would be staggering. We do not believe intervenor has struck such gold in a field previously thought to be barren.⁸ The fact that some repetition may be inevitable does not mean that there should be immunity to add to it. Cf. *Murray v. Brancato*, 1943, 290 N.Y. 52 (no privilege for judge to circulate privately a calumnious opinion); see Annot., 146 ALR 913. We will not hold that there is a constitutional privilege to print privately what, we must assume for present purposes, were classified documents simply because intervenor had first disclosed them to a Senate subcommittee whose function was totally unrelated thereto.⁹

The fact that republication is not within the constitutional privilege does not exclude consideration of other protection. To the extent that a congressman has responsibility to inform his constituents, his performance of that responsibility may be protected from liability by a common law privilege, as is an executive official's. A news release about the speech may well be as protected as the speech itself. Cf. *Barr v. Mateo*, 1959, 360 U.S. 564 (absolute immunity given executive officer for libel contained in news release). How far

⁸ Those with long memories may recall the frequent, but unaccepted, challenges to a former junior senator from Wisconsin to repeat outside the walls of Congress the calumnies he often expressed within their protection. If intervenor is correct, we would see no reason for distinguishing between the types of legislative speech that could be repeated.

⁹ Examples might be multiplied. If an unpublished manuscript was taken by parties unknown and subsequently was introduced into the records of a Congressional committee, could it be thought that the common law copyright was lost by reason of the Speech or Debate clause? Or, in the case of a published work, that the statutory copyright would thereby be extinguished?

this immunity should go will depend upon the facts of the particular case. An even more difficult question is whether the measure of the grand jury's right to make personal inquiry of the legislator follows the immunity. Arguably, it may go further, or not so far. Because we do not consider this a matter of present substantial importance, and partly because the court is not in total agreement, we presently resolve it, without binding ourselves for future purposes, if the matter is more sharply put, that he may not be questioned at all as to republication.¹⁰ We do not, of course, mean by this that we are ruling, even tentatively, on the limits of criminal liability.

WITNESSES PRECLUDED

It may be wondered why, since under *Cobbledick v. United States*, ante, until he has been held in contempt we apparently have no jurisdiction to advise intervenor as to the measure of his immunity from testifying, we have nevertheless been answering that question. The reason is that such answer is a necessary condition to passing upon the immunity of others, such as Rodberg, who intervenor claims in this appeal to come under his legislative protection. We now turn to this.

a) *Legislative Aides*

It is not only accepted practice, but, we would think indispensable, for a legislator to have personal aides in whom he reposes total confidence. This relationship could not exist unless, during the course of his employment, the aide and the legislator were treated as one. To the extent, if any, that there might be exceptions, again, for present purposes, we do not inquire. We note, however, that this synonymy is founded upon the relationship, not on the

¹⁰In part we do this because we propose, so far as possible, to make a practicable decision that avoids unnecessary or doubtful points that might burden the Supreme Court.

fact of employment. Rodberg, for example, is not protected from inquiry as to events unconnected with intervenor at the time of occurrence. We reject intervenor's contention that the fact of hiring insulated him from all inquiry as to prior events related to the Papers, but not to intervenor. See *Heine v. Raus*, 4-Cir., 1968, 399 F.2d 785, 190-91.

b) *Third Parties*

United States v. Johnson, ante, holds that any person who dealt with a legislator with respect to speech or debate can not be inquired of if the object is to attack the legislator's motives in speaking. Specifically, it could not be shown that the defendant's speech was written by a constituent, or that the defendant was paid to deliver it. The Court did not suggest that a legislator was free in all respects from criminal prosecution. *But see id.*, at 185. Indeed, were it to be thought so, one need only turn to the other portions of the Clause, which regulates, procedurally, criminal trials. With respect to third persons, provided that the principles of *Johnson* are observed, we can see no reason for them to be free of inquiry as to their own conduct regarding the Pentagon Papers, including their dealing with intervenor or his aides. We have already spoken as to Rodberg, pre-employment. At the other end, so far as intervenor's privilege is concerned, we hold that no immunity was conferred upon Beacon Press simply because, if he did, intervenor delivered the Papers to it for private publication. Indeed, we would hold, if his appeal can be thought to raise that question,¹¹ that whatever Beacon Press

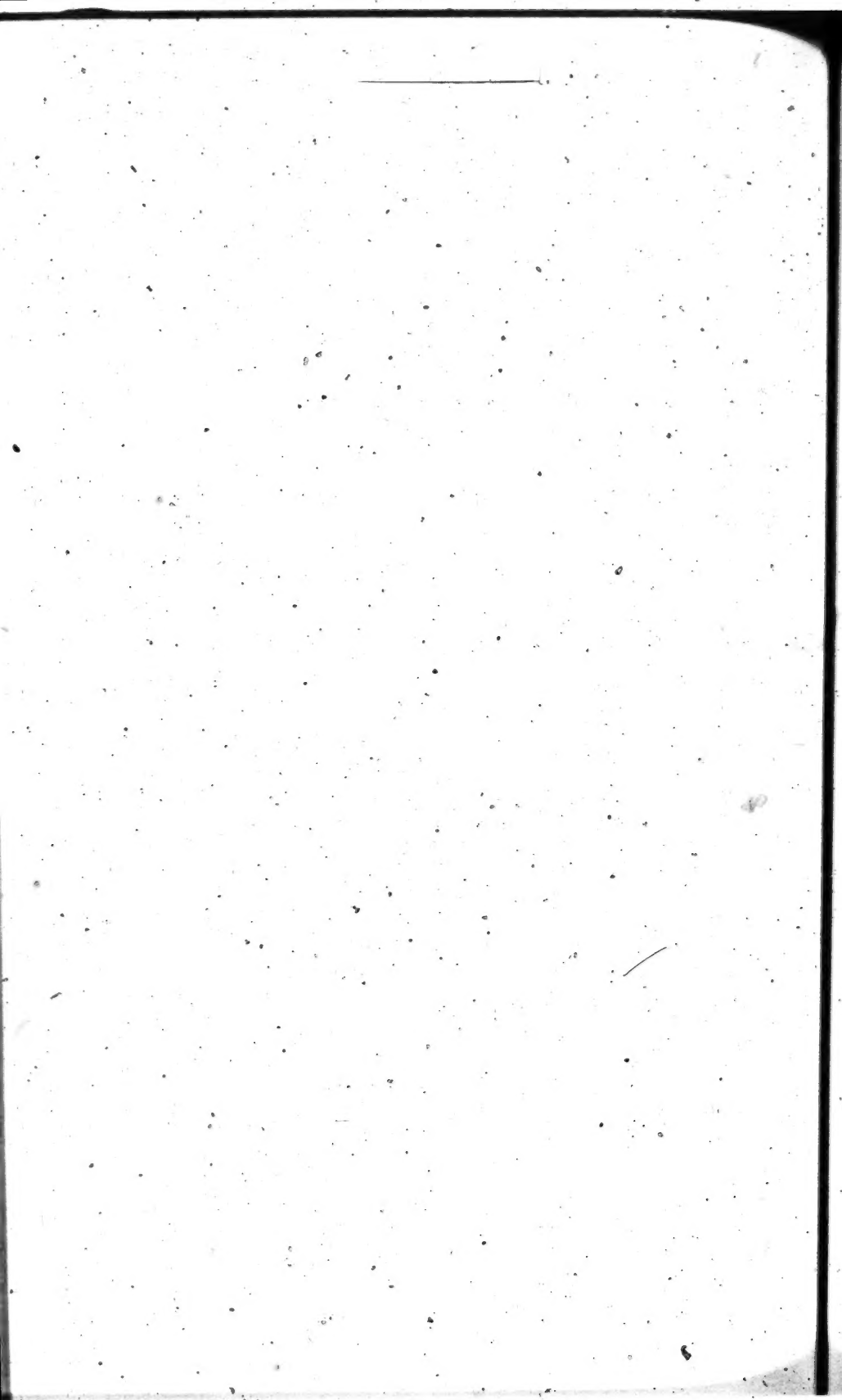
¹¹We take it that intervenor believes it does, in the light of a contempt proceeding he instituted when he erroneously believed the United States Attorney was using a subpoena to examine the Beacon Press' bank records during the processing of this appeal.

did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to intervenor or others in connection with the Papers subsequent to their introduction into the subcommittee records. Payment for delivering a copy, by a post-speech agreement, is not comparable to a payment for initially delivering the speech. Similarly, the district court's refusal to include Webber in its order was correct.

PROCEDURE

Intervenor has presented us with a request covering the type of witnesses he believes should be excluded altogether, and an elaborate procedure for the court to employ as to testimony the government proposes to introduce through other witnesses. Much of this request goes by the board with our rejection of some of his basic premises. As to the rest we find such procedure unnecessarily cumbersome, and suggest a simpler solution. Intervenor may supply a list of his personal aides, and the dates of their employment. Upon the court's being satisfied as to the correctness of the list it shall order that no questions be asked of any of them relating to the Pentagon Papers or to intervenor's legislative activities during the period of their employment. It shall further order that no questions be asked of any other witness as to communications with intervenor regarding legislative activities, including the furnishing of information, or with his aides during such periods, directed to intervenor's motives or purpose in introducing the Papers into the subcommittee records. We believe the contempt power of the court will be a sufficient guarantee of enforcement without the need of adopting intervenor's extraordinary request that every question be submitted to him for approval before it is asked.

Except to the extent that it is modified herein the order of the district court is affirmed. Even though intervenor has essentially lost his appeal, we do not believe this an appropriate case in which to award costs.



APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 71-1331
and 71-1332.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

JUDGMENT

Entered: January 7, 1972

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The orders of the District Court of October 28, 1971, are affirmed, except that the Protective Order of that date is modified to read as follows:

- (1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or pur-

poses behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

- (2) Dr. Leonard S. Rodberg may not be questioned about his own actions while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment.

No costs on these appeals.

The court does not propose to stay mandate beyond the statutory period except upon motion, which must be shortly made, showing substantial cause.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Fishman, Reid, Reinstein and Nissen.]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331
and 71-1332

UNITED STATES OF AMERICA,

v.

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before Aldrich, *Chief Judge*
McEntee and Coffin, *Circuit Judges.*

On Petition for Rehearing, etc.

January 18, 1972

Robert J. Reinstein and Charles L. Fishman for appellant.
David R. Nissen, Assistant United States Attorney, for
appellees.

ALDRICH, *Chief Judge*. Intervenor has filed a petition for "reconsideration." The word is accurately used; intervenor is arguing the same points he made before. His proffered excuse is that the "expedited schedule . . . severely constricted . . . research." If this was so, it is the first we have heard of it. No pre-argument protest of lack of time was raised; no protest was made at the argument; no request was made for permission to file a further brief, either then, or during the eight weeks we had the matter under advisement. Nor should it be forgotten that petitioner sought intervention in August 1971. We would have thought he had ample opportunity to do his research. F.R.A.P. 40 was not promulgated as a crutch for dilatory counsel. *Cross Baking Co. v. NLRB*, 1 Cir., 12/30/71, ___ F.2d ___, nor, in the absence of a demonstrable mistake, to permit reargument of the same matters.

We pass this, in view of the importance of the case. More difficult to overlook is the fact that, with our views and reasoning now fully before him, intervenor, in rearguing the republication issue, fails to address himself to our specific "attempts to reconcile fundamentally antagonistic social policies" (*Barr v. Mateo*, 1959, 360 U.S. 564, 576). Further generalities about "legislative activity in the classic and historic sense" do not indicate to us why we are wrong in drawing a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of, we must presently assume, lawfully classified documents, through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern. In repeating the familiar arguments why he should be absolutely protected with respect to introducing the exhibits before the subcommittee—a matter no one questions—and talking broadly about his duty to inform the public, intervenor does not answer our analysis of what should be the subsequent limits of protection.

The petition for reconsideration is denied.

Alternatively, petitioner seeks clarification of our order. We do not, however, understand how he can think the order permits inquiry of third persons directed to his motives. We see no need of clarification here. His further inquiry, whether the questions could be asked of third parties about "preparation for the hearing if that *relates* to his motives for holding it," (emphasis supp.) perhaps calls for comment. During oral argument we posed a hypothetical, not repeated in our opinion, but to which intervenor now returns. Suppose that the President's private diary is stolen, and thereafter a Congressman introduces it into the legislative record. Petitioner's present brief suggests that since this would be an exercise of "the informing function of exposing Executive behavior," the only answer he would have to make would be to the "House and . . . the people," unless he participated in the theft. His point is put best in the form that preparation is part of speech, and that if inquiry may be made even as to third parties as to the sources, he will be inhibited. Here, it seems to us, some adjustment of competing interests must be made. We believe that if a document shown to be improperly at large is sought to be traced, it may be traced by inquiry of third parties even if the effect may be to lead to a legislator. In *United States v. Johnson*, 1966, 383 U.S. 169, the prosecution was barred from questioning third parties about their role in preparing a congressional speech only because the questions were directed to proving that the speech itself was part of a criminal conspiracy. This should not mean that all illegal activity is insulated from inquiry, apart from prosecution, simply because it could be characterized as preparation for a speech. The introduction of the document into the subcommittee records, like Thetis' immersion of Achilles, cannot effect universal protection.

Intervenor has a valid point with respect to the portion of the order relating to Rodberg. This is clarified by inserting after the phrase "his own actions" the words "in the broadest sense, including observations and communications, oral or written, by or to him, or coming to this attention."

This brings us to the government's motion to revoke our stay, which was granted broadly, pending appeal, to cover all facets of intervenor's contentions. With a limit of time on the grand jury proceedings, we amend the stay by substituting the order called for by our opinion, and contained in the judgment, but as presently clarified as to Rodberg. This amendment and substitution is, in turn, stayed until January 26, 1972, to permit intervenor, if he sees fit, to apply forthwith, prior to Friday of this week, to the Circuit Justice.

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331

UNITED STATES OF AMERICA,

v.

JOHN DOE,

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

No. 71-1332

SAME.

v.

SAME

SAME

Before ALDRICH, Chief Judge,
McENTEE and COFFIN, Circuit Judges.

ORDER OF COURT

Entered January 18, 1972

Pursuant to opinion of instant date, the broad stay granted on October 29, 1971, as modified, is hereby revoked and there is substituted the order contained in the judgment of January 7, 1972 as clarified by the explanatory clause contained in our opinion defining

"actions" as "in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention."

The present order of revocation and substitution is stayed until January 26, 1972.

The motion for clarification is otherwise denied.

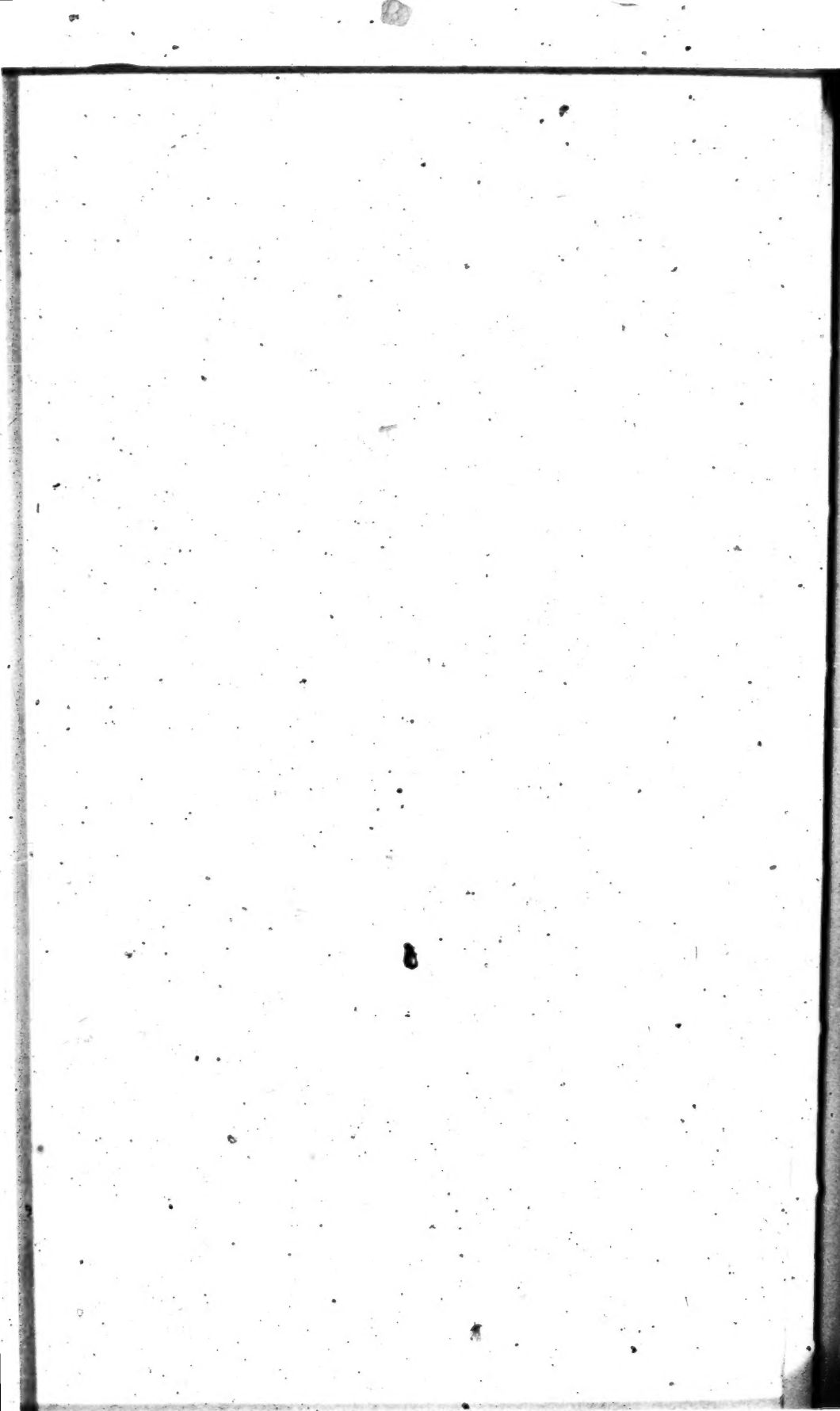
The motion for reconsideration is denied.

By the Court

/s/ Dana H. Gallup

Clerk.

[cc: Messrs. Fishman, Reid, Reinstein and Nissen.]



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Supreme Court U.S.

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E. ROBERT SEEVER, CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1971

No. A-746

81-1017

**MIKE GRAVEL,
PETITIONER,
v.**

**UNITED STATES,
RESPONDENT.**

**BRIEF OF UNITARIAN UNIVERSALIST
ASSOCIATION, AMICUS CURIAE, IN SUPPORT
OF THE PETITION FOR A WRIT OF CERTIORARI**

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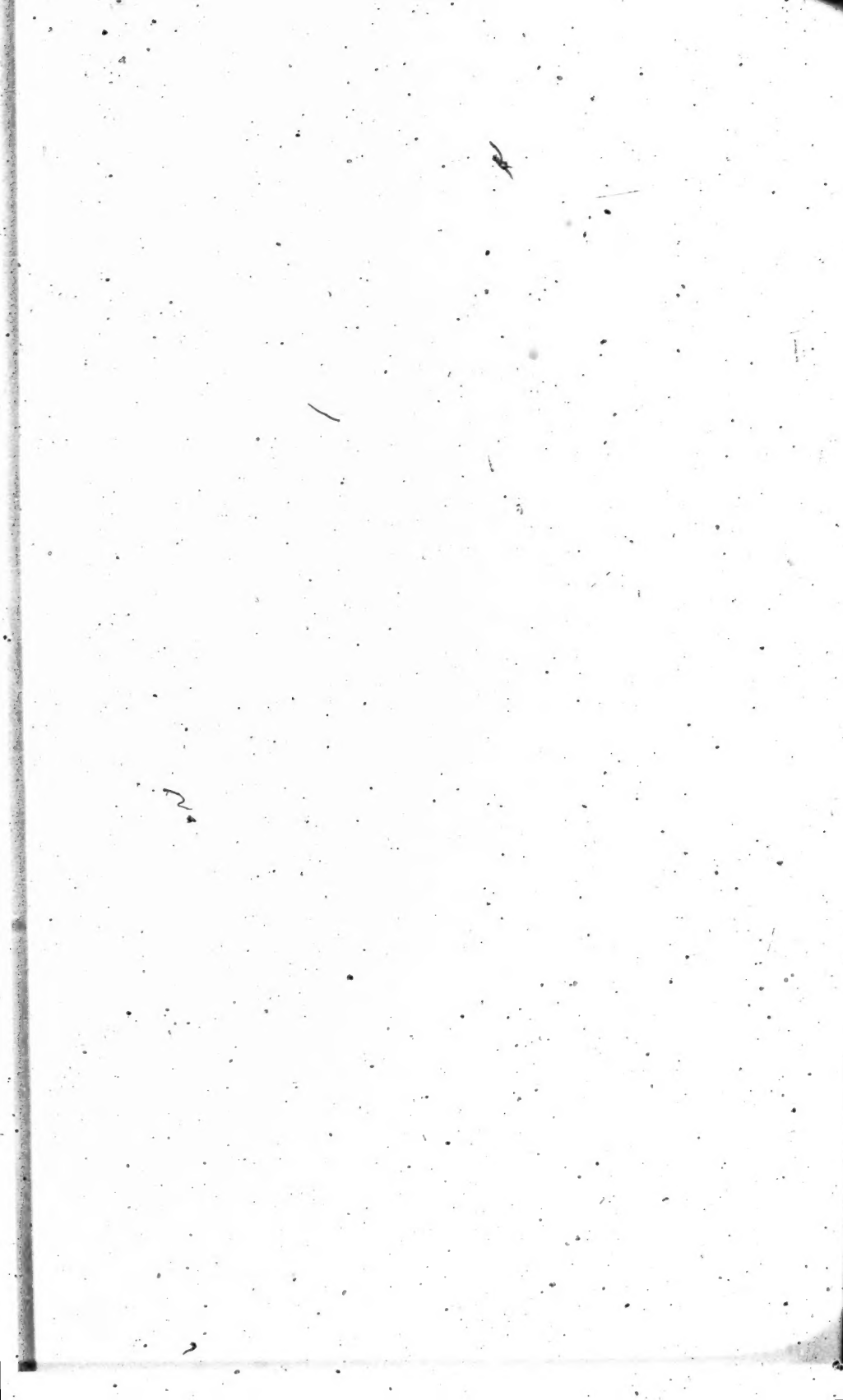


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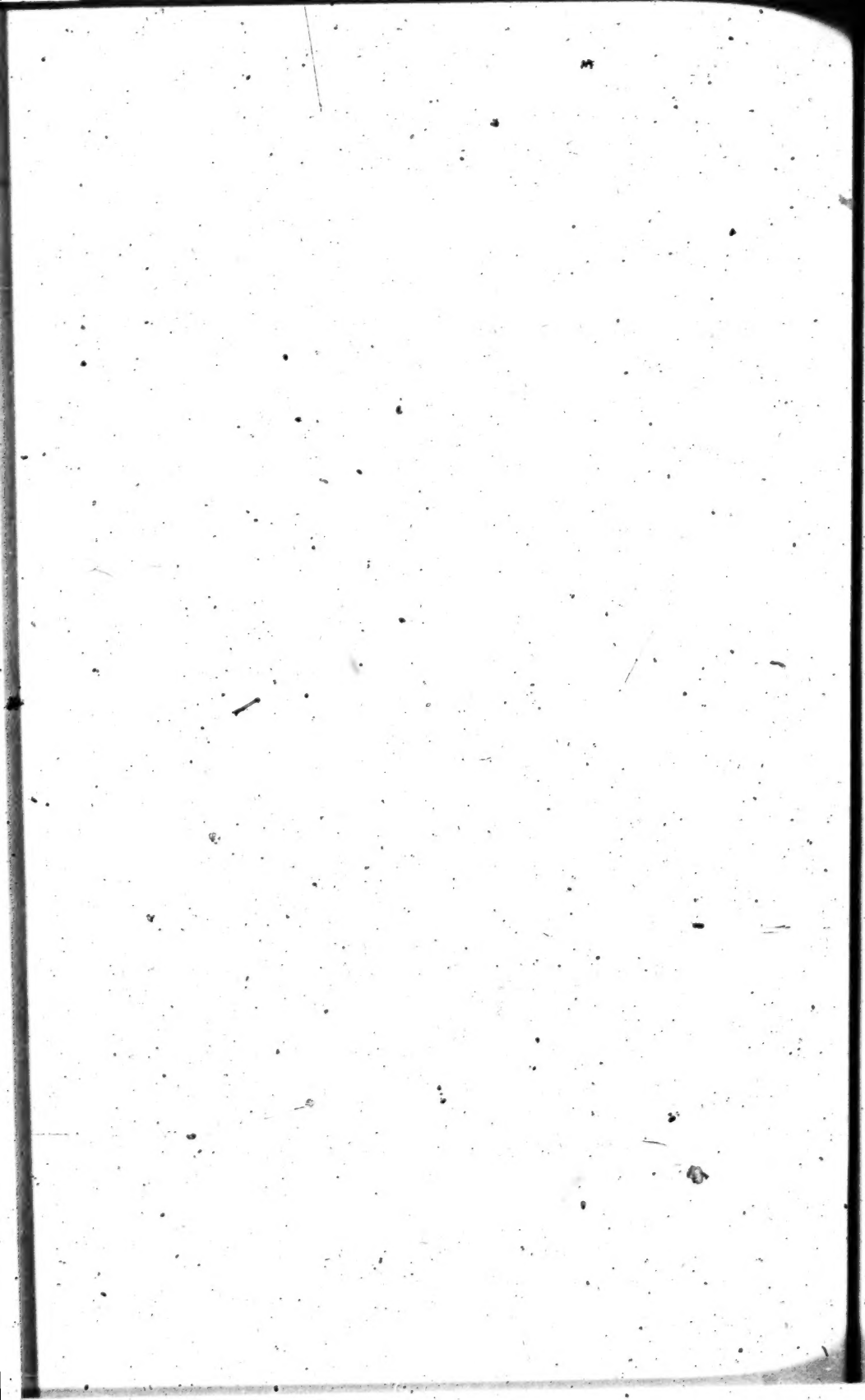
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1971

No. A-746

MIKE GRAVEL,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

**BRIEF OF UNITARIAN UNIVERSALIST
ASSOCIATION, AMICUS CURIAE, IN SUPPORT
OF THE PETITION FOR A WRIT OF CERTIORARI**

Interest of Amicus

This brief in support of the petition for certiorari is filed with the consent of the parties;¹ it is submitted because, as will appear, the amicus has a direct and substantial interest in the outcome of this litigation. Nonetheless, the amicus recognizes that at this stage briefs by amici are not favored. Accordingly, the amicus will make its points with as much economy as possible, and

¹ The letters of assent have been filed with the clerk of the court, copies thereof appear at the end of this brief.

it will not burden this court with a repetition of matters comprehensively treated in the petition.

The Unitarian Universalist Association is a religious association established more than 200 years ago and incorporated under the laws of The Commonwealth of Massachusetts. Beacon Press is a division of the association and is subject to its direction and control. In its opinion of January 7, 1972, the court of appeals said:

"We would hold, if this appeal can be thought to raise that question, that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to [Senator Gravel] or others in connection with the [Pentagon] Papers subsequent to their introduction into the subcommittee records." (Op. at 12-13)

Thereafter, on January 11, 1972, the government served a grand jury subpoena on Gobin Stair, the Director of Beacon Press and a second subpoena on him or the custodian of the records calling for the production of all Beacon records pertaining to the Pentagon Papers publication. While these subpoenas have been withdrawn, the government, in papers filed in *Unitarian Universalist Association v. Joseph L. Tauro, et al*, (D. Mass., No. 72-136-C), a related proceeding, specified that "... identification of the participants in the transaction whereby the 'Pentagon Papers' were obtained and published by Beacon Press is sought, along with the details of such transactions." The interest of the amicus is, therefore, evident.²

² To be sure, the court of appeals subsequently noted that the amicus was not bound by the language in the opinion since Beacon Press was not a party to the case. While technically accurate, of course, the court's response is unconvincing. It is evident that the court's language reflects its considered judgment and would be adhered to in any further proceeding.

Reasons for Granting the Writ.

After concluding that the speech and debate clause necessarily insulated petitioner from any inquiry into his publication and prepublication activity concerning the Pentagon Papers, the court of appeals held that the clause: (1) Did not prohibit grand jury inquiry into petitioner's subsequent private publication of the papers through Beacon Press, although *deus ex machina* the court tentatively accorded him a common law privilege against further interrogation (but not necessarily criminal liability) on that matter (Op. pp. 10-11). (2) Did not prohibit interrogation of third persons except where the "object [of the inquiry] is to attack the legislator's motives in speaking" (Op. p. 12). As we shall show, each holding is erroneous. And their manifest importance,³ centering as they do upon important prerogatives of members of congress, provides ample warrant for plenary consideration by this court. *Powell v. McCormack*, 395 U.S. 486.

I. Private Publication.

The court of appeals recognized that the protection afforded by the speech and debate clause extends beyond simply insulating petitioner from inquiry concerning any documents he introduced into congress. At least since *Kilbourn v. Thompson*, 103 U.S. 168, 204, it has been settled that the protection of the clause extends to all "things generally done . . . in relation to the business before [congress]." See also *Powell v. McCormack*, *supra*, at 501-

³ "[F]or any Speech or Debate they [Senators and Representatives] shall not be questioned in any other place." U.C. Const. art. 1; § 6.

⁴ The court of appeals had no doubt of the importance of the issues before it. It explicitly recognized the importance of the case both in the opening sentence of its opinion of January 7 as well as in its petition denying the motion for rehearing.

506. Nonetheless, despite *Kilbourn* and this court's admonition in *United States v. Johnson*, 383 U.S. 169, 179, that "the privilege should be read broadly," the court of appeals gave the clause an extremely restricted scope. The clause, it said, protects only one category of "things generally done" in congress; namely, things "generally done" in relation to congressional deliberations. "Our courts," said Judge Aldrich, "have expanded the privilege beyond the act of debating within congress . . . only when necessary to prevent indirect impairment of such deliberations" (Op. p. 9). This view of the clause, in turn, led the court to reject petitioner's claim that his private publication of speeches made in or documents submitted to congress is protected.

The court of appeals was wrong in concluding that petitioner's private publication was not protected, *even assuming its narrow conception of the clause*. What is more, such a restrictive reading of the clause is inconsistent with its history and purpose, as well as the decisions of this court.

1. The court of appeals nowhere purports to demonstrate why the subsequent private publication of documents introduced into congress is not, in the court's language, "necessary to prevent indirect impairment of [congressional] deliberations." The court simply assumes that private publication will not have any effect on *future* congressional deliberations. That assumption is, on its face, highly vulnerable; congress is, after all, an ongoing body, and it would seem apparent that private publication by a legislator represents one method of affecting future congressional deliberations. But the difficulty with the court's assumption is much more basic. The court's willingness to make *any* assumption about the effect of private publication on future congressional deliberations requires a degree of judicial superintendence of the legislative pro-

cess which is wholly at odds with the doctrine of separation of power. It is for congress, not the court of appeals, to determine whether a senator's private publication of congressional documents will further future congressional deliberations.⁵

2. It is interesting to observe that the court nowhere denies that private publication can aid future congressional deliberations. Rather, the court simply opines that such a claim "proves too much," because it would extend the protection of the clause to any speech made outside congress, at least if it had been previously delivered in congress. That possibility is brushed aside with the observation that "we do not believe [petitioner] has struck gold in a field previously thought to be barren" (Op. p. 10). We would have supposed that more than an *ipse dixit* was required to dispose of petitioner's claim. Moreover, the court of appeals never considered whether, given the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open" (*New York Times v. Sullivan*, 376 U.S. 254, 270), this court's holding in *Barr v. Mateo*, 360 U.S. 564,⁶ would call for protection of speeches repeated outside of congress, entirely apart from the strictures of the speech and debate clause.

3. The infirmity in the court of appeals' position is further demonstrated by its concessions. It conceded that some kinds of private publications were protected by the clause: petitioner could claim protection with respect to "republishing such as in the news media or the congress-

⁵ See *United States v. Johnson*, *supra*, 383 U.S. at 185, where the court recognized that the question of the reach of the speech and debate clause would have been substantially affected by a congressional judgment that certain conduct was *not* protected by the clause.

⁶ In *Barr v. Mateo*, this court held that, in a libel action, the utterances of a federal official were absolutely privileged so long as they were made "within the outer perimeter" of his official duties.

sional record, which is the *natural consequence of a speech* and is necessarily protected" (Op. p. 8).⁷ Surely the conclusion that one category of subsequent publication — by newspaper — is a "natural consequence" of speech, but that other closely similar categories of publication — by book, etc. — are not, is wholly question begging, particularly so given the court's further concession that, in fact, the latter type of publication "may be customarily done by members of Congress" (Op. p. 9). If congressmen customarily engage in the private publication of their speeches why is that not a "natural consequence" of their speech?

In denying the petition for rehearing, the court of appeals sought to escape the foregoing difficulties by yet another formulation. The court suggested a distinction—

"between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of, we must presently assume, lawfully classified documents through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern." (Op. on reh. p. 3)

This shift in analysis is striking. What is "customary" publication now becomes a function of a judicial determination of what is relevant to a congressional subcommittee, not whether the publication is done "privately." Plainly, any judicial assessment of what is "relevant" to a congressional committee intrudes a court far into the legislative process itself — an intrusion which, we believe, is in manifest conflict with time-sanctioned principles of separation of powers. Not only is this difficulty ignored by the court of appeals, its new analysis is ad-

⁷ Emphasis added.

7
vanced without even a glancing reference to its earlier conclusion that the "privilege protects against a claim of irrelevancy" (Op. p. 6).

4. Underlying these difficulties is the court's effort to confine the speech and debate clause to its narrowest historical setting. Like its predecessors in the English Bill of Rights and in the Articles of Confederation and in the state constitutions, the clause specifically prohibits executive sanctions for speeches made in the legislature. But, like the other provisions in a document "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs," (*McCulloch v. Maryland*, 4 Wheat. 316, 415) the clause has a breadth and meaning which transcends the specific events which gave it birth. See *Powell v. McCormack*, 395 U.S. 486, 506. The clause reflects fundamental principles concerning the appropriate distribution of power among the three branches of government. Accordingly, the clause must be "recognized as an important protection of the independence and integrity of the legislature." *United States v. Johnson*, 383 U.S. at 178. Not surprisingly, therefore, "the language of the Constitution is framed in the broadest terms," and it is to be "read broadly" (*Id.* at 179, 182-183). This, in turn, means that the clause "cannot remain static if it is to remain meaningful."⁸ To some degree, the precise contours of the clause are shaped by what is appropriately and "customarily" done in the mo-

⁸ "In its application, it must be geared to the realities of the manner in which a modern legislative system operates. It cannot afford to be permanently attached to the ways in which legislatures discharged their responsibilities when the Republic was founded, or for that matter, even fifty years ago. . . . Modern legislatures have had to adopt [sic] their techniques of operation to the increasingly complex society within which they must function. New techniques and new methods of procedure have gradually evolved. The doctrine of legislative privilege cannot remain static if it is to remain meaningful." Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate*, 2 Suffolk U.L.R. 34 (1968).

modern legislative process. Contemporary legislative practice, not seventeenth and eighteenth century history, measures what is "generally done . . . in relation to the business before [congress]."

5. The court's effort to confine the speech and debate clause to its narrowest historical setting shows, moreover, that, on this occasion, the court was a bad historian. The speech and debate clause was adopted by the constitutional convention "without discussion and without opposition" largely because it was a familiar one, having existed in the Declaration of Rights, the Articles of Confederation and in various state constitutions. *United States v. Johnson*, *supra*, at 177. Plainly, therefore, the general import of the clause, if not all its details, was understood by members of the constitutional convention. And it seems clear that the clause's admittedly spare language was understood by them to protect not only a legislator's free and untrammelled participation in the legislative process, but also his duty to contribute to an enlightened electorate. Thus both the New Hampshire Constitution of 1784 and the Massachusetts Constitution of 1780 explicitly tied the protection of their clauses to that of the "rights of the people."⁹ See also *Tenny v. Brandhore*, 341 U.S. 367, 377 n.6. The court below failed to appreciate that the speech and debate clause "performs an important function in representative government." *Powell v. McCormack*, *supra*, at 503. And representative government presupposes that a legislator may communicate

⁹ See, e.g., Mass. Const. art. XXI (1780). "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." N.H. Const. pt. 1 art. XXX (1784). "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever."

with his constituents and the country at large, as well as with his colleagues. The only checks on this legislative prerogative stem from the political process, not from the executive or judicial departments — a result which is, of course, entirely consistent with the underlying assumptions of our polity. Cf. *Munn v. Illinois*, 94 U.S. 133, 134.

6. Finally, even assuming the court of appeals' reading of history, we think it evident that the clause protects petitioner's private publication of the Pentagon Papers. For we have here little more than ancient problems in a twentieth century context: the executive still seeks to intimidate and discipline members of the legislature for conduct which casts aspersion upon the executive's handling of a matter of overriding national interest. The only difference between this effort and that of earlier times is that techniques more appropriate to our age, interrogation, harassment and exposure, have been substituted for the ancient devices of arrest and imprisonment.¹⁰

II. *Third Party Protection.*

A

The court of appeals restricted the protection of the clause in another significant manner. Inquiry of third parties was not barred by the clause unless (citing *Johnson*) "the object [of the inquiry] is to attack the legislator's motives in speaking" (Op. p. 12):

"With respect to third persons, provided that the principles of *Johnson* are observed, we can see no reason for them to be free of inquiry as to their own

¹⁰ It is well worth noting here that the court below did not in fact rule out criminal prosecution for petitioner. (Op. pp. 10-11.)

conduct regarding the Pentagon Papers, including their dealing with the intervenor or his aides... [we] hold that no immunity was conferred upon Beacon Press simply because, if he did, intervenor delivered the Papers to it for private publication.¹¹

The importance of this holding cannot be underestimated. It is evident that any legislator will and must frequently act in cooperation with or through private parties in the discharge of his functions. Simply put, this is a necessary and "customary" aspect of the functioning of the legislative process in the twentieth century. Accordingly, even the narrow protection afforded by the clause to petitioner under the holding of the court of appeals is illusory: where the clause shields a legislator from direct inquiry, his conduct still can be inquired of through interrogation of the third parties with whom he dealt. But, surely, "[i]ntimidation... harassment, embarrassment" of a legislator (Op. p. 6) can be accomplished by either form of inquiry. The only difference is the point at which the executive pressure is laid, not in end result. And the end result of allowing unlimited inquiry of third parties necessarily must be either to intimidate the legislator in the discharge of his constitutional functions, and/or to intimidate those private persons with whom he would deal.

The court of appeals, however, thought that petitioner's rights are adequately secured so long as third party inquiry is prohibited where its "object is to attack the legislator's

¹¹ The court of appeals added:

"Indeed, we would hold, if his appeal can be thought to raise that question, that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to intervenor or others in connection with the Papers subsequent to their introduction into the subcommittee records. Payment for delivering a copy, by a post-speech agreement, is not comparable to a payment for initially delivering the speech. . . ."

motives in speaking" (Op. p. 12). It is difficult to see what relevance the court thought that this limitation had in this case since petitioner's third party contacts occurred after he placed the Pentagon Papers before Congress. More fundamentally, however, in the context of this problem (compare *United States v. Johnson, supra*) the suggested standard lacks content. By what criteria could a court determine whether "the object" of a grand jury interrogation of Beacon Press concerning petitioner's publication of the Pentagon Papers was to "attack" petitioner's motives in speaking? Finally, we are at a loss in understanding why the protection of the clause should depend upon "the object" of the interrogator? The injury done to the legislator in no significant way depends upon a resolution of that elusive element.

B

The petition for certiorari demonstrates that there is authority recognizing protection for third parties for private publication of legislative speeches. See, e.g., *Wason v. Walter*, L.R. 4 Q.B. 73 (1868). See also *Doe v. McMillan*, — F.2d — (D.C. Cir. 1972), 40 L.W. 2471, expressly recognizing that the clause protects not only members of congress but federal employees assisting them in publishing a congressional committee report. We submit that there are no relevant differences between Beacon Press and the federal employees in *McMillan*, particularly once it is conceded that private publication by members of Congress is "customary." Moreover, even if Beacon Press could not invoke the protection of the speech and debate clause, the court of appeals nowhere explains why it would not be protected by a "common law privilege" such as the court tentatively accorded to petitioner. In *Doe v. McMillan, supra*, the court of appeals recognized such a privilege for

officials of the District of Columbia who supplied information to the congressional committee.

This court has never definitively resolved the extent to which the speech and debate clause, or some other privilege, protects third parties,¹² in either of two distinct situations: *first*, with respect to their legal accountability for action taken in conjunction with members of Congress, an issue which, of course, is not raised here; *second*, and of grave importance here, the extent to which third parties can be interrogated concerning their dealings with a member of Congress, the direct inquiry of whom could not be undertaken. That the questions of legal accountability and of interrogation are quite distinct was fully appreciated by the court below (Op. p. 10).

Kilbourn v. Thompson, *supra*, and its progeny are not dispositive of the latter question. In *Kilbourn* members of Congress were held protected by the clause, but the congressional marshals were held responsible in damages for the execution of an unconstitutional legislative arrest order. See also *Dombrowski v. Eastland*, 387 U.S. 82; *Powell v. McCormack*, 395 U.S. 486, 501-506. Thus in *Kilbourn*, the clause operated so as to protect legislators, but not third parties, from the consequences of *unconstitutional* action which deprived citizens of rights secured to them by the constitution of the United States. See *Powell v. McCormack*, *supra*, at 503-504. Here, by contrast, there is no claim that any citizen's constitutionally protected liberty has been abridged by the tortious conduct of third parties. Moreover, here, unlike *Kilbourn*, petitioner's conduct was constitutionally protected activity, and Beacon Press simply assisted petitioner in the exercise of his constitutional prerogative. And finally, here the crucial question raised by the petition is not the legal accountability

¹² Either directly, or derivatively through their association with a member of congress.

of Beacon Press (e.g., in a criminal case) for its conduct,¹³ but whether it can be *interrogated* about its dealings with petitioner in circumstances where he cannot be interrogated. *Kilbourn* is not even remotely relevant to that question.

In closing, we would observe that Beacon Press is in a sensitive and unfortunate position in view of the court of appeals' ruling. It is under an obligation to petitioner, a United States Senator, not to violate his privilege. Yet, unless this court acts, it may soon be under a judicial order to do just that.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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¹³ We, of course, do not concede that criminal sanctions could validly be imposed for that conduct.

CERTIFICATE OF SERVICE

In accordance with Rule 33, I hereby certify that I have made service of three copies of the Brief Of The Amicus Curiae In Support Of The Petition For Certiorari on all counsel of record as follows: Solicitor General, Department of Justice, Washington, D.C.; Counsel for United States by personally delivering three copies to his place of business; Charles Fishman, Esquire, counsel for petitioner by delivering three copies to his business office; and Harvey Silvergate, Esquire, counsel for respondent, by causing three copies to be delivered by hand to his business office.

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[SEAL]

January 28, 1972

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Re: Mike Gravel, U.S. Senator v.
United States, No.
October Term, 1971

Dear Mr. Frederick,

In response to the request in your letter of January 26, 1972, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of The Unitarian Universalist Association.

Very truly yours,

(s) ERWIN N. GRISWOLD
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MIKE GRAVEL
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Very truly yours,

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No. 71-1017

FILED

FEB 16 1971

ROBERT SEAGER

In the Supreme Court of the United States

OCTOBER TERM, 1971

SENATOR MIKE GRAVEL, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT**

MEMORANDUM FOR THE UNITED STATES

**ERWIN N. GRISWOLD,
Solicitor General,
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MEMORANDUM FOR THE UNITED STATES

The court of appeals has rendered an important decision concerning the scope of the Speech or Debate Clause which warrants plenary review by this Court. As we pointed out in our opposition to the stay, we believe the court below correctly decided that republication is not protected by the Clause, the principal issue raised in the instant petition. Nevertheless, we are concerned by several other aspects of the decision—namely the granting of blanket protection under the Clause to legislative aides and, although in less

sweeping terms; the extension of the protection of the privilege to third parties. We have filed a petition for a writ of certiorari seeking review of these portions of the court's judgment as well as of its ruling granting a common law privilege to legislative aides.

Because of the manifest importance of the case, we urge that the Court grant both petitions in order that all aspects of the decision below may be reviewed here.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

Supreme Court of the United States

OCTOBER TERM, 1971.

Nos. 71-1017

71-1026

FILED

APR 7 1972

MICHAEL RODAK, JR., CLERK

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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MIKE GRAVEL, UNITED STATES SENATOR,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

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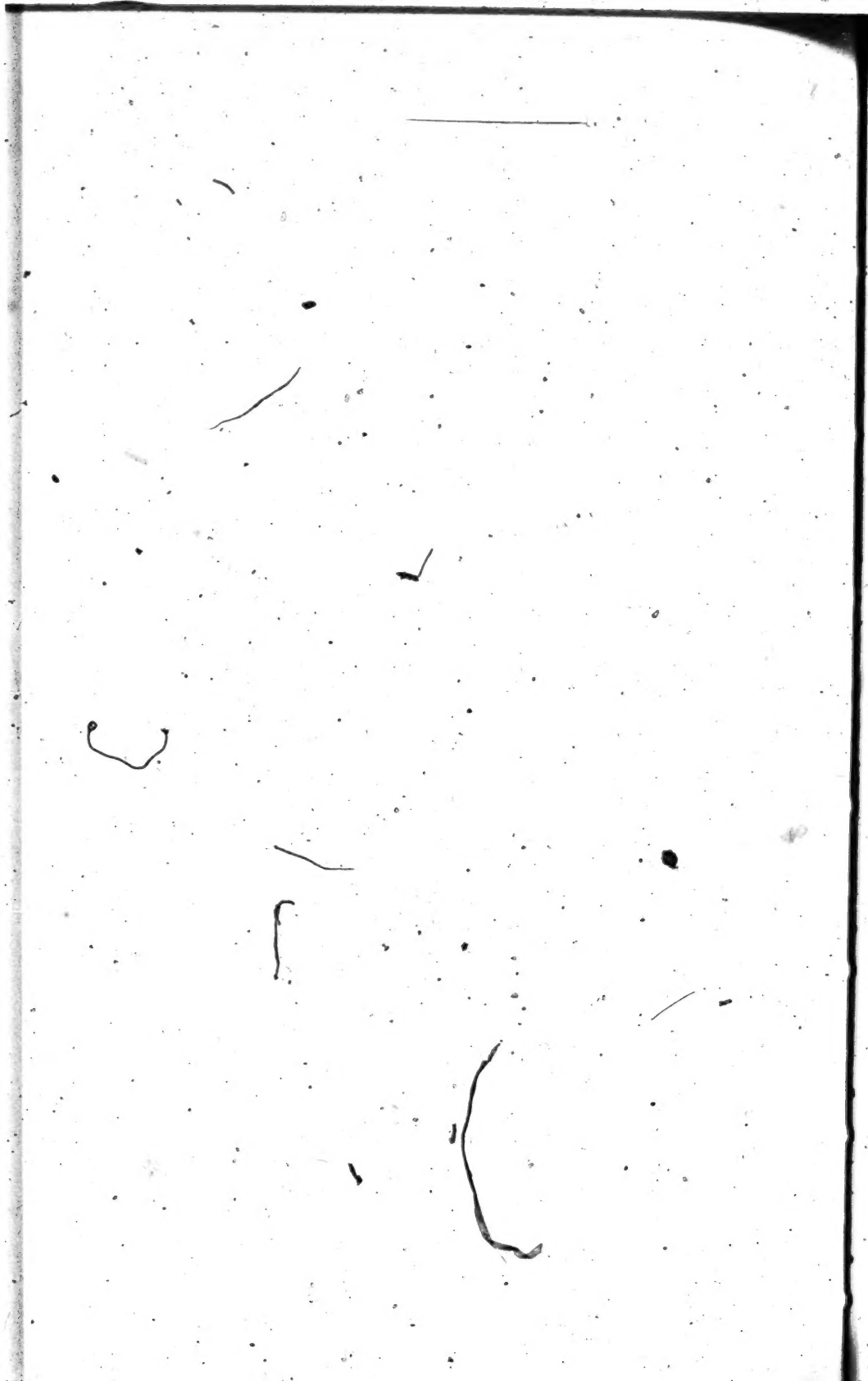
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Supreme Court of the United States.

OCTOBER TERM, 1971.

Nos. 71-1017
71-1026

MIKE GRAVEL, UNITED STATES SENATOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

v.

MIKE GRAVEL, UNITED STATES SENATOR,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

CONSOLIDATED BRIEF OF
SENATOR MIKE GRAVEL.

Opinion Below.

The opinions of the United States Court of Appeals for the First Circuit and the Protective Order (as modified) are not yet reported and are reproduced in the petition for writ of certiorari filed by each party hereto. The opinion of the District Court is reported at 332 F. Supp. 930 (D.C. Mass. 1971).

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on January 7, 1972 and was amended on January 18, 1972. A timely petition for rehearing was denied on January 18, 1972, and Senator Gravel's petition for writ of certiorari was filed on February 9, 1972. The Solicitor General petitioned for writ of certiorari on February 10, 1972. Both petitions were granted on February 22, 1972. The mandate of the Court of Appeals was stayed by Mr. Justice Brennan acting as Circuit Justice on January 24, 1972, pending the filing and disposition of the petition for writ of certiorari, provided that filing of the petition occur on or before February 10, 1972. The stay was extended until disposition of the case on the merits, and an expedited schedule was ordered upon motion of the Government.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals rightly held that there was jurisdiction under 28 U.S.C. § 1291 because Senator Gravel had no other means of obtaining review and consequently the denial by the District Court of his motion to quash was, as to him, a final appealable order. *Perlman v. United States*, 247 U.S. 7 (1918). See *United States v. Ryan*, 402

U.S. 530, 533 (1971). The Court of Appeals' finding in this regard has not been challenged by either party hereto. Similarly, this Court has jurisdiction.

Questions Presented.

Questions presented by Senator Gravel:

1. Does the constitutional responsibility of a United States Senator to inform his constituents and colleagues about the workings of government require that his actions in publishing an official, public record of the subcommittee of which he is chairman, containing documentary information critical of executive conduct in foreign affairs, be accorded protection as legislative activity under the Speech or Debate Clause?

2. May a federal grand jury at the request of the executive branch inquire into and investigate the legislative activities of a senator by utilizing compulsory process to interrogate persons with whom a senator dealt and to secure documents about his planning and executing a senate subcommittee hearing and publishing the official record of that hearing?

3. May an otherwise impermissible inquiry be allowed because the legislative activity in question was carried out in a manner deemed by a federal court to be irregular and contrary to the court's notions of germaneness and of the proper way for the Senate to internally allocate its functions?

Questions presented by the Solicitor General:

4. Whether Article I, section 6, of the Constitution providing that "... for any Speech or Debate in either House," "the Senators and Representatives . . . shall not be questioned in any other Place" bars a grand jury from ques-

tioning aides of members of Congress and other persons about matters that may touch on activities of a member of Congress which are protected "Speech or Debate."

5. Whether an aide of a member of Congress has a common law privilege not to testify before a grand jury concerning private republication of material which his senator-employer had introduced into the record of a Senate subcommittee.

Constitutional Provision Involved.

Article I, section 6, of the United States Constitution, commonly referred to as the Speech or Debate Clause, provides:

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place. (Emphasis added.)"

Statement of the Case.

The facts which form the basis for all of the legal submissions in this case are undisputed and are reported in the decisions of the District Court (S.G.P. 38)¹ and Court of Appeals (P.W.C. 1a).

¹ All reference to the appendices to Senator Gravel's petition for a writ of certiorari are referred to as "P.W.C." since under the Rules of this Court the material contained in the appendices to the petition for a writ of certiorari need not be reprinted in the joint appendix. All references to the appendices to the Solicitor General's petition for a writ of certiorari are referred to as "S.G.P."

Senator Mike Gravel is a duly elected and certified member of the United States Senate and chairman of the Senate Subcommittee on Buildings and Grounds. On June 29, 1972, he convened a public meeting of the subcommittee with United States Congressman John Dow testifying as a witness. During the course of the meeting, Senator Gravel read and inserted into the official subcommittee record part of the material commonly referred to as the "Pentagon Papers" (P.W.C. 2a). Senator Gravel stated at the outset of the hearing that the conduct of United States foreign policy in Indochina was relevant to his subcommittee, as to practically every subcommittee in the Congress, because of its effects upon the domestic economy, and specifically, the lack of sufficient federal funds to provide for adequate public facilities (S.G.P. 46-47). In order to make the contents of the subcommittee record widely available to his colleagues and to the electorate, Senator Gravel arranged, without any personal profit to himself, for its verbatim publication² by Beacon Press, a nonprofit publishing division of the Unitarian Universalist Association (P.W.C. 2a). Also in July, the Department of Justice and the United States Attorney for Massachusetts requested the United States District Court for the District of Massachusetts to convene a grand jury.

On August 24, 1971, the federal grand jury sitting in Boston and investigating the release of the Pentagon Papers, subpoenaed Dr. Leonard Rodberg, an aide to Senator Gravel, and ordered him to appear and give testimony three days later before the grand jury (App. 6). Dr. Rodberg had become a member of Senator Gravel's personal legislative staff on June 29, 1971, and acted from that

² The publication of the subcommittee record by Beacon Press has been variously referred to in the briefs and opinions of the Court below as "publication" and "republishing." We use the term "publication" throughout this brief.

point on under Senator Gravel's direction and control. Dr. Rodberg is still on the personal legislative staff of Senator Gravel (App. 11). On August 27, 1971, Dr. Rodberg moved to quash the subpoena in the court below (App. 5-7). On that same date Senator Gravel moved to intervene, which motion was briefed by the parties and granted by the court below on September 1, 1971 (App. 1-2).

Senator Gravel then moved to quash the grand jury subpoena or for a specification of the purpose and scope of the inquiry (App. 2-4). Senator Gravel and Dr. Rodberg both alleged that the Internal Security Division of the Justice Department intended to interrogate Dr. Rodberg before the grand jury about the actions of Senator Gravel and his aides in making available to his colleagues and the electorate the contents of the material forming the subcommittee record, which was critical of executive conduct in foreign relations (App. 4, 6). Evidence in support of this allegation was introduced, and the Internal Security Division did not deny it (App. 9 and S.G.P. 42). On the contrary, the Internal Security Division asserted that none of the actions taken by Senator Gravel, including those at the subcommittee hearing, were privileged by the Speech or Debate Clause and that the Executive could subpoena and criminally prosecute Senator Gravel himself (App. 9-10). The Internal Security Division characterized the grand jury investigation as an "executive proceeding" (App. 8); and suggested that Senator Gravel himself might be subpoenaed at which time he could invoke his Fifth Amendment privilege against self incrimination (App. 8). The Internal Security Division also contended before

* Proof of Dr. Rodberg's status as a personal aide to Senator Gravel was established by affidavits of Dr. Rodberg (App. 6), Senator Gravel (App. 11) and the Sergeant-at-Arms of the Senate (App. 11).

the District Court that Dr. Rodberg was not a staff member of Senator Gravel (App. 51) and that the federal courts are the proper place and possess the power to determine the appropriateness, relevancy and germaneness of the subcommittee meeting (App. 85). Oral argument was heard on these motions on September 10, 1971.

On October 4, 1971, the District Court issued its memorandum of decision and protective order which denied Senator Gravel's motions to quash or for specification (S.G.P. 52). The District Court held that Article 1, section 6, clause 1 of the Constitution—the Speech or Debate Clause—prohibited the grand jury from making any inquiry of any witness about Senator Gravel's "conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 [or] about things done by the Senator in preparation for and intimately related to said meeting" (S.G.P. 52); and prohibited questioning of Dr. Rodberg "about his own actions on June 29, 1971, after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for or intimately related to said meeting." (S.G.P. 52.) The District Court "rejected the Government's argument [that the subcommittee meeting was unprivileged] . . . on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations" (S.G.P. 47).

The District Court held, however, that Senator Gravel's actions in securing the public distribution of the official subcommittee record by its publication "stands on a different footing and, in the Court's opinion, is not embraced by the Speech or Debate Clause." (S.G.P. 48.)

The District Court made three basic findings of fact which were not appealed by the Justice Department:

(1) Dr. Rodberg is and has been since June 29, 1971, a personal staff assistant of Senator Gravel (S.G.P. 38) (App. 54):

(2) "[A]s personal assistant to [Senator Gravel], Dr. Rodberg assisted [Senator Gravel] in preparing for disclosure and subsequently disclosing to [Senator Gravel's] colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called 'Pentagon Papers,' which were critical of the Executive's conduct in the field of foreign relations." (S.G.P. 39.)

(3) "Viewing together the crimes this grand jury is investigating and the chronology of acts and events leading up to Dr. Rodberg's subpoena, the Court infers that the government's interest in his testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." (S.G.P. 42.)

On October 12, 1971, Senator Gravel filed before the District Court a motion for reconsideration and/or stay pending appeal. The court stayed enforcement of Dr. Rodberg's subpoena pending reconsideration and asked for a brief from the Justice Department on the issues presented. While this motion was under consideration by the court, counsel for Senator Gravel discovered that the grand jury had subpoenaed and intended to question witnesses about matters the Senator believes are protected from inquiry by Article I, section 6, clause 1, and the District Court's protective order of October 4, 1971 (App. 17). Counsel also discovered that the grand

jury had subpoenaed and intended to question witnesses about matters which were then under submission to the court. Among these witnesses was Howard Webber, with whom Senator Gravel had unsuccessfully negotiated for publication of the subcommittee record. Senator Gravel moved to intervene and quash the Webber subpoena, alleging that the grand jury intended to interrogate him solely about these activities (App. 17). The Justice Department did not deny any of these allegations, either in the District Court or in the Court of Appeals, and admitted in the District Court that its primary interest in Mr. Webber related to the conduct of Senator Gravel and his aides in attempting to publish the subcommittee record (App. 128). Moreover, the subpoena issued on Webber was *duces tecum* and directed him to produce records and notes of conversations held on July 23 with Dr. Rodberg "concerning the Pentagon Papers."

On October 27, 1971, Senator Gravel filed in the District Court a motion for further relief seeking to prevent the inquiries discussed above by providing the court and Senator Gravel with some judicial mechanism for assuring that the court's protective orders and stays were being observed and that questions regarding the applicability of the court's protective order would be properly decided (App. 12). The District Court denied Senator Gravel's motion (App. 19).

The District Court granted Senator Gravel's motion to intervene with respect to the subpoena issued on Mr. Webber. While the court denied on October 28, 1971, Senator

⁴ At the oral hearing on Senator Gravel's motion, counsel for the Internal Security Division stated for the first time that they did not intend to seek an indictment against Senator Gravel. However, even this belated disclaimer was not unqualified; counsel for the Internal Security Division stating, "this is not probable." (App. 127-128.).

Gravel's motion to quash Mr. Webber's subpoena, it granted the Senator a temporary stay on Webber's subpoena pending appeal to the Court of Appeals (App. 20). On the same day the District Court denied the motion for reconsideration in Dr. Rodberg's case but granted the Senator a temporary stay of Dr. Rodberg's subpoena pending appeal to the Court of Appeals (App. 21). On October 28, 1971, Senator Gravel sought by motion, but was denied, stenographic copies of the grand jury minutes (App. 19). On October 29, 1971, the District Court issued a supplemental protective order to its order of October 4, 1971 (App. 21). This supplemental protective order, issued so as to protect the Senator's position pending appeal, ordered the grand jury not to question any witness about the conduct of the Senator or his aides in arranging for the publication of the subcommittee record.

On October 28, 1971, Senator Gravel filed his notice of appeal in both cases with the clerk of the District Court and moved immediately in the Court of Appeals for a stay pending appeal. The Court of Appeals granted the stay on October 29, 1971 (App. 22-23). That same day, the United States filed a cross appeal to the Court of Appeals. Oral argument was had on an expedited schedule on November 10, 1971. Before the Court of Appeals the Internal Security Division asserted that the Speech and Debate privilege had no applicability at all to grand jury proceeding and therefore the Executive, in conjunction with the grand jury, could subpoena Senator Gravel and anyone who assisted him in the performance of his duties and interrogate them about all of the Senator's activities (P.W.C. 5a).

The Court of Appeals' opinion of January 7, 1972, noted that "important questions as to the extent of the legislative privilege" were raised by the appeals (P.W.C. 2a). The Court of Appeals concluded that Senator Gravel "has essentially lost his appeal," and affirmed the judgment of

the District Court and entered a modified protective order (P.W.C. 13a).

The Court of Appeals rendered its decision in three parts dealing with Senator Gravel and two parts dealing with those who assisted Senator Gravel in performing his legislative activities. With respect to Senator Gravel the court below held that "for what he says or does on the floor of the Senate or before the subcommittee [Senator Gravel] is concededly protected by the absolute privilege from all criminal and civil liability" (P.W.C. 5a) and that "this protection extends to any written reports of the committee proceedings . . . including material unspoken at the hearing but inserted directly into the record." (P.W.C. 5a.) The Court of Appeals also held that the Speech or Debate Clause prohibited "inquiries [of the Senator] which would restrict acquisition of information" since any other holding would "chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them." (P.W.C. 7a.) While holding that some forms of published congressional speeches or reports are "necessarily protected" (i.e., news media or the Congressional Record), nevertheless the court held that the constitutional privilege of the Speech or Debate Clause did not encompass Senator Gravel's exercise of the informing function in publishing the subcommittee record and therefore did not bar grand jury investigation into this conduct (P.W.C. 9a).⁵

⁵ The Court of Appeals, admitting that "the court is not in total agreement" on this point, nevertheless "presently" held that the Senator and his aides could not personally be questioned as to "republication," . . . "without binding ourselves for future purposes." (P.W.C. 11a.) More exactly, the Court of Appeals found that the Speech or Debate Clause privilege did not extend at all to the "republication," but that the Senator and his aides may be protected from direct interrogation by a common law privilege (P.W.C. 10a-11a).

Turning its attention to legislative aides the court below held that the requirement "for a legislator to have personal aides in whom he reposes total confidence" was so strong that "the aide and the legislator [must be] treated as one" (P.W.C. 11a). Thus, the court held that in order to protect Senator Gravel's rights, the grand jury could not question his aide, Dr. Rodberg, with respect to any matter about which it could not question the Senator. Last, the Court of Appeals held with respect to those who assisted him in publishing the subcommittee record that so long as no effort is made to attack a legislator's motives "we can see no reason for them to be free of inquiry as to their own conduct regarding the Pentagon Papers including their dealing with intervenor [Senator Gravel] or his aides." (P.W.C. 12a.) Thus the opinion of the court below permits grand jury questions of Howard Webber, director of the Massachusetts Institute of Technology Press, and officials of the Beacon Press about how Senator Gravel prepared for the subcommittee hearings and his activities, and those of his aides, in publishing the official record of the hearings.

The Court of Appeals issued a subsequent opinion denying a motion for reconsideration in which it suggested that ordinary publication of a subcommittee record might enjoy constitutional immunity but that the publication in question did not because it was done "privately" and because the subcommittee had "no conceivable concern" with the documents entered into the record (P.W.C. 2c).

During the pendency of proceedings in the Court of Appeals, two subpoenas were served upon officials of Beacon Press but were revoked due to the stay in effect (App. 24, 141-149).

Summary of Argument.

I.

The speech and debate privilege has consistently been construed broadly by this Court to encompass actions of congressmen which are customarily done in relation to the business before the legislature and which fulfill important goals of representative democracy. The scope of the privilege has never been fixed, either in this country or in England, to outmoded usages and needs of the legislature, but has instead always corresponded to its actual workings. Such a construction of the privilege is necessitated by its history and by the major purpose for its inclusion in our Constitution, which was to preserve the rights of the people in representative government by reinforcing separation of powers and giving practical security to congressmen against potential harassment and intimidation by the Executive.

The publication of committee records critical of executive conduct in foreign relations is a classic example of the informing function of Congress. In our system of representative government, congressmen have the obligation to enlighten the electorate about matters of public concern and in particular about the administration of government by the executive branch. This function has been assiduously performed by congressmen throughout our history and is pivotal to our democratic values. Moreover, under basic principles of separation of powers, congressmen must be able to exercise their own judgment, independently of restraints by the executive and judiciary, of what information of public importance should be disclosed to or withheld from the people. Courts and prosecutors are not referees over what a congressman may say to the electorate or how he may say it. There is no assertion

here that the privilege is being used to violate an individual's constitutional rights; this is a classic separation of powers case.

The framers of the Constitution intended that the publication of congressional proceedings should be entitled to absolute privilege from inquiry under the Speech or Debate Clause. And in 1797, when a federal grand jury investigated the actions of a congressman who sent out newsletters critical of the administration's foreign policy (and said to contain military secrets), Jefferson and Madison wrote a comprehensive and eloquent protest. They stated that the Speech or Debate Clause was designed to guarantee to congressmen an absolute privilege, from the cognizance or coercion of the coordinate branches, to communicate with the electorate; and they condemned the grand jury investigation as a blatant violation of the Speech or Debate Clause.

The free speech guarantee of the English Bill of Rights of 1689, from which the Speech or Debate Clause derives, resulted from a prosecution of the Speaker of the House of Commons for publishing a committee report critical of the Crown. The English Bill of Rights was written specifically to insure that such publications would be guaranteed by the legislative privilege. In England, it is now settled by judicial decisions as well that the publication of legislative proceedings for the information of the electorate is immune from judicial inquiry. There is no reason why the privilege should be construed more narrowly in the United States.

Finally, it is well settled that the privilege is not divested by concepts such as "irregularity" and "nongermaneness." The privilege would be of little value if it turned, *ad hoc*, on such amorphous considerations. And Congress has exclusive power under the Constitution to prescribe rules

for its governance and to discipline wayward members; no supervisory power is vested in the courts.

II.

The Justice Department now concedes that Senator Gravel cannot personally be questioned before the grand jury about his legislative acts, but the Justice Department claims the right to conduct an intensive investigation into the Senator's legislative acts by asserting that everyone who assisted the Senator in discharging his duties may be subject to unrestrained interrogation. Such an investigation would yield precisely the same information about privileged conduct and would accomplish indirectly what is conceded to be prohibited by more direct intrusions—the intensive breach of the sanctity of the legislative process. For the grand jury to investigate, by direction or indirection, how and why a senator prepared and held a committee hearing and published the official record for dissemination to the electorate is a clear violation of Separation of Powers. And such an investigation implicates the same potential for the intimidation, harassment and distraction of a congressman as if he himself were questioned personally.

The same constitutional evil would result from the very substantial inquiry into privileged conduct permitted under the decision of the Court of Appeals, which allowed the compulsory interrogation of everyone with whom a congressman dealt except his personal aides, so long as the interrogators deny any intention to attack his motives. Given the realities of the modern-day legislative process, congressmen must seek the advice and assistance of persons outside their immediate staff in deciding, for example, whether to speak out and how to vote on controversial issues. The interrogation of these persons before the grand

jury about privileged legislative activity violates the doctrine of separation of powers and would substantially inhibit a congressman in the performance of his constitutional obligation. The unconstitutionality of such interrogation in no wise depends upon the motives of the interrogators.

The proposed inquiry by the executive branch in this case is particularly unseemly inasmuch as it has long and successfully championed a testimonial privilege for executive aides which it now seeks to deny to congressmen, even though the source of the latter's privilege is the Constitution itself. The reason for the application of the privilege against the questioning of aides is identical in both situations—the preservation of confidentiality in the decision-making process. This reason applies as well to printers who assist congressmen in performing the informing function; for without such assistance a congressman could not effectively communicate with the electorate. After much litigation in England, the British courts have held such printers immune from both questioning and accountability in order to effectuate the legislators' privilege.

Aside from the broadest of generalities, the Executive has offered no reason, even though it had ample opportunity to do so in the lower courts, why the breach of the privilege in this case would be helpful, let alone necessary, to it in the enforcement of the criminal laws. Nor would recognition of the privilege intolerably hamper law enforcement in the future. The Executive and grand jury possess ample means to ferret out crime without intruding into the legislative process. And those extremely rare cases where investigations would be hindered are more than outweighed by the preservation, intact, of our system of separation of powers.

Argument.

INTRODUCTION.

This case presents this Court with a classic separation of powers problem. The Executive, by seeking to invoke the aid of a judicial body, that is, the grand jury, with its broad subpoena and contempt powers, is trying to conduct an investigation into various aspects of a meeting of the Senate Subcommittee on Buildings and Grounds conducted by Subcommittee Chairman Senator Mike Gravel. While the Justice Department has refused to specify the questions which it seeks to put to witnesses concerning the subcommittee meeting and the preparations for it, as well as the subsequent preparation and publication of the record of that meeting, the Justice Department has from the start of these proceedings refused to deny that these subjects are precisely the objects of its inquiry.⁶ The only conclusion which is possible on the basis of this record is that drawn by the District Court—that the Executive wishes to conduct an intensive investigation of Senator Gravel's preparation for the Senate subcommittee meeting and the subsequent publication of the record. The Senator, in all of the proceedings below, and in this Court, has sought and seeks an order sufficiently broad and workable to insure that his interests as a legislator, and those of his colleagues and constituents, are protected from unwarranted, unseemly and unconstitutional intrusion and inquiry by co-ordinate branches of government.

a. *The Scope of the Privilege Publication and the Informing Function.*

The Court of Appeals held that the privilege of the Speech or Debate Clause encompassed Senator Gravel's

⁶ See S.G.P. 41, n. 3; App. 9, 42, 82.

activities in preparing for and holding the subcommittee hearing, and the Government has not appealed this holding. However, the Court of Appeals believed that the protection of the Clause does not go beyond the four walls of the Capitol and, specifically, does not protect the actions of a member of Congress in informing his colleagues and the electorate about executive conduct in foreign affairs through the publication of the subcommittee record. The court thus permitted the grand jury to investigate the Senator's actions in arranging for the record's publication through the compulsory interrogation of individuals whose assistance was indispensable in performing his constitutional function to inform his colleagues and the public.

The court's holding that the Senator's conduct in publishing this subcommittee record is subject to judicial inquiry is inconsistent with the history and purposes of the Speech or Debate Clause, the thrust of past decisions of this Court, and fundamental principles of separation of powers. We discuss this issue in Part I of this brief. We there show that the Clause has always been, and must be, construed liberally to insulate from judicial inquiry all of the customary and necessary functions of Congress, and that the publication of subcommittee reports reflecting on executive administration is a classic example of the well-recognized informing function and plays an important role in representative government. We also show that the framers of the Constitution specifically intended to prohibit grand jury investigations of congressmen who, in newsletters or otherwise, were critical of the executive stewardship of foreign relations. Finally, we show that the immediate purpose of the free speech privilege of the English Bill of Rights was to guarantee that publication of parliamentary proceedings be within the ambit of the privilege; and Parliament by statute and the English courts by judicial decisions have forbade inquiries of members

and printers who assisted them in publishing such proceedings. There is simply no support in history or policy for the contrary conclusion of the Court of Appeals.

b. *Executive and Judicial Inquiries into Privileged Legislative Activities.*

The Court of Appeals, by its opinion, would allow a very substantial inquiry by the executive and judicial branches into privileged legislative conduct, and this should not be allowed to stand. Yet the Justice Department seeks in this Court to intrude even further into the actions of a coordinate branch, and to subpoena a Senator's aides and those who assisted him in meeting his constitutional obligations and to interrogate them with respect to what even the Justice Department now concedes to be protected legislative conduct, such as the holding of a hearing.

At the early stages of these proceedings, the Justice Department adopted the stance that it could, if it wished, subpoena Senator Gravel, and, for that matter, other members of the Senate, in order to inquire about the holding of the subcommittee meeting and the preparation and publication of the record of the meeting.⁷ The Justice Department also maintained in the District Court that no privilege existed and that it could indict and prosecute Senator Gravel himself for both holding the subcommittee hearing and publishing the record,⁸ and in the Court of Appeals that the Senator could be interrogated and indicted but not prosecuted for the subcommittee hearing and interrogated, indicted and prosecuted for the publication of the record.⁹ As the

⁷ See App. 89-90.

⁸ See App. 81-83, 84-85, 86-87, 90.

⁹ See generally brief of Justice Department in the Court of Appeals.

case moved through the courts, the Justice Department, in evident response to the lower courts' obvious distaste for such a claim of power, retrenched to the position that it seeks only to subpoena the Senator's aides and other parties who worked with the Senator in preparing for the meeting and for the publication of the record. The Justice Department, then, appears content with the knowledge that it might accomplish, through the interrogation of the Senator's aides and assistants, what it was prohibited by both courts below from accomplishing by direct interrogation of the Senator—to conduct an intensive investigation of a Senator's legislative activities, to pierce the confidential relationship between the Senator and those who assisted him in the performance of his constitutional obligations, to learn every detail concerning the meeting and the publication.

The Justice Department has thus seen what appears to it to be a back door into the Senate committee rooms, but as we shall show in Part II, this back door is likewise blocked by the stone wall of the Speech or Debate Clause. The Clause must be interpreted and enforced in light of the requirements of the legislative branch and in light of the purposes of the Clause. We shall show that to allow the Justice Department to breach the separation of powers wall by pursuing a Senator's activities through questioning of his trusted aides and those whom he requires in order to perform his constitutional functions would be to accomplish precisely the same constitutional evil as if the Senator himself were interrogated directly. It would permit unrestrained intrusions by the executive and judicial branches into the Capitol. This would not only render illusory the protection secured to Senator Gravel from the constitutional guarantee but would threaten the very independence and integrity of the legislative branch.

PART I.

The Publication by a Senator of an Official, Public Record of a Subcommittee, of which he is Chairman, critical of Executive Conduct in Foreign Relations is Privileged from Judicial Inquiry by the Speech or Debate Clause.

A. THE PRIVILEGE MUST BE READ BROADLY TO PROTECT THOSE ACTIONS OF CONGRESSMEN WHICH FOSTER THE GOALS OF REPRESENTATIVE GOVERNMENT.

The Court of Appeals' holding that the publication of committee records containing information of overwhelming public concern was not within the purview of the Speech or Debate Clause was bottomed upon a narrow, almost literal reading of the Clause which limited its applicability to the four walls of Congress. This approach is basically inconsistent with prior opinions of this Court, which have held that the Clause embraces all actions of members of Congress which are necessary to effectuate the functions of Congress and to protect and foster the goals of representative government. It is also inconsistent with the historical application of the privilege in England and with the intentions of the framers.

1. *Prior Decisions of this Court.*

In the very first interpretation of the Speech or Debate Clause, this Court held that the history and policies underlying the Clause demanded that it be given a liberal construction to immunize from judicial inquiry not only speeches and debates on the floor but also committee reports, resolutions and votes and all things "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880). Subsequent decisions have consist-

ently reaffirmed this standard and have applied the guarantee of the Clause to all activity of a congressman "in the sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); and this Court has admonished that "the privilege should be read broadly" to include all conduct "related to the due functioning of the legislative process." *United States v. Johnson*, 383 U.S. 169, 172, 179 (1966).

By thus adopting a functional approach to the Clause and insulting the "legislative acts of . . . [a] member of Congress [and] his motives for performing them," *id.*, at 185, this Court was hardly indulging in "catch phrases."¹⁰ On the contrary, this approach has derived from the basic purpose of the Clause, which is to immunize actions taken by a member of Congress in the discharge of his obligations as a representative of the electorate and thereby prevent intimidation and harassment by a possibly hostile executive and judiciary. This was nowhere better stated than by Chief Justice Parsons in the seminal decision of *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)¹¹:

"These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and

¹⁰ P.W.C. 8a.

¹¹ Quoted with approval in *Kilbourn*, *supra*, at 203-204.

to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, *for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.*" (Emphasis added.)

The applicability of the Clause, therefore, does not turn on mere geographical considerations involving the fortuitous location of a congressman's activities but on the "exercise of the functions of [his] office." *Ibid.* It is for this reason that the Clause protects a legislator's conduct at committee hearings, for "[i]nvestigations, whether by standing or special committees, are an established part of representative government." *Tenney v. Bradhove, supra*, at 377. Likewise, a variety of other functions resulting from the nature of a congressman's office, such as voting and committee resolutions, *Powell v. McCormack*, 395 U.S. 486, 502-503 (1969), *Kilbourn v. Thompson, supra*; and obtaining material for committee hearings, *Dombrowski v. Eastland*, 387 U.S. 82 (1967), have been held within the privilege. In none of these cases was there involved speech or debate in the narrow, literalistic sense; yet, as the Court said in *Kilbourn, supra*, at 203, if the ordinary and necessary functions of Congress are not privileged, of what value is the Clause? A literalistic construction of the Clause in this case would overrule almost one hundred years of decisions.

The Court of Appeals did not deny that the recognized duties of congressmen include informing the electorate about the workings of government.¹² Indeed, that fact is a presupposition of our system of representative government, where "[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them," *Bond v. Floyd*, 385 U.S. 116, 136 (1966). See generally section I.B., *infra*. Nevertheless, the Court of Appeals simply held the informing function to be outside the protection of the Speech or Debate Clause by asserting that the Clause encompasses only *one* function "generally done" in Congress—the narrow category of congressional deliberations.¹³ This limited view of the Clause cannot be reconciled with the reasoning in prior decisions of this Court, which stressed the legislative process *as a whole*. It is also inconsistent with the historical antecedents of the privilege in England and with the purposes for its inclusion in our Constitution.

2. *Historical Application of the Privilege in England.*

A review of the origins and development of the free speech privilege in England demonstrates clearly that its scope has always been determined by the actual functions of the legislature at any given moment in history and has never been frozen to past usages; in this manner, it has evolved as a *practical* instrument of security for legislators. Each of Parliament's privileges originated, in fact, in the fourteenth and fifteenth centuries out of a *judicial* conception of the House of Lords, the highest court of the

¹² App. 9a-10a.

¹³ App. 9a.

land.¹⁴ The acquisition of similar privileges by the House of Commons was based on its function of acting on private petitions and was first limited to that narrow activity.¹⁵ As the powers of the council decayed in the late fifteenth and early sixteenth centuries, the House of Commons asserted growing authority over bills submitted by the Crown, and a practical security against the King's oft-expressed displeasure became a felt necessity. It was "out of this need for unrestrained criticism of government measures"

¹⁴ See generally C. H. Mellwain, *The High Court of Parliament and Its Supremacy*, 229-246 (1910); C. F. Wittke, *The History of English Parliamentary Privilege*, 13-20 (1921); Neale, *The Commons Privilege of Free Speech in Parliament*, in 2 *Historical Studies of the English Parliament* 147-176 (Fryde & Miller ed. 1970); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecution in the Courts*, 2 *Suffolk L. Rev.* 1, 3-5 (1968).

Parliament of course claimed a number of privileges other than freedom of speech, and those too derived from judicial antecedents—*e.g.*, the freedom of members and their servants from arrest, and the right of each House to punish members and outsiders for contempt.

¹⁵ Neale at 163. The judicial origin of the speech and debate privilege is well illustrated in *Strode's Case*, which this court has termed "one of the earliest and most important English cases dealing with the privilege." *United States v. Johnson*, *supra*, at 182, n. 13. In 1512, Richard Strode, a burgess of Parliament, was convicted for obstructing tin mining because he voted in favor of a bill controlling abuses against the tin miners. He was imprisoned and petitioned Parliament for a remedy, and a special bill was passed setting him free. 4 Henry VIII, c. 8. As Neale points out, this case "has no concern with the relations of the crown and the commons. The act concerning him asserts the obvious principle that an inferior court cannot punish members of a superior court for their actions in that court." *Id.*, at 160, n. 45. See also Mellwain, *supra*, at 219-223. More than 150 years later, when the Commons' functions had conflicted with the Crown's prerogatives and Parliamentary supremacy was established, the act was declared to be a general act. See note 14, *infra*.

that the free speech privilege was formalized into the Speaker's petition in 1541.¹⁶ Yet even then the privilege went only as far as the jurisdiction of the House and through the reigns of Henry VIII and Elizabeth I afforded no protection for "licentious" discussion into matters involving the prerogatives of the Crown.¹⁷

The ever-increasing independence and legislative authority of the House of Commons was, however, an irreversible process, and cognizance was taken of matters heretofore reserved to the Crown's domain, such as the succession and the conduct of foreign wars. The House began to conceive of itself as the Grand Inquest of the Nation, demanding "a voice in the general policy of the country, and [the right] to criticize the action of the executive in modern fashion."¹⁸ The consequent intrusion into the Crown's prerogative led to a century-long battle over freedom of speech, with the Tudor and Stuart monarchs claiming the right to interfere in Commons' debates and punish members for "seditious" and "licentious" speech. If the privi-

¹⁶ Neale at 164-165. As Neale points out, when Parliament's initiative was by petition, there was no real threat to the wide powers of the Crown since the petition was only a request for a remedy and the king's response became the statute. The king could, of course, and often did, qualify the sense of the petition in his reply and thereby mold the statute. When, however, the bill procedure was introduced, the king's power of modification was eliminated and he could only assent to or veto the bill. The bill was thus the actual text of law enforceable in the courts and the veto was an unreliable weapon. Elizabeth tried, therefore, to reinstitute the old petition procedure, but did not succeed. The House, on the other hand, needed protection against more direct interference with their debates. *Id.*, at 170-172. Thus, the speech and debate petition did not arise independently of the change in Parliament's functions, but as a result of it.

¹⁷ Neale at 164-165.

¹⁸ 1 Anson, *Law and Custom of the Constitution* 34-35 (4th ed. 1909).

lege were to be maintained as an instrument of security for Parliament, a broader, absolute definition of the privilege, which would preserve the House's expanded jurisdiction, was essential.¹⁹ This dispute over the scope of the privilege witnessed systematic harassment of members who dared criticize the Crown, with the King claiming that the privilege ended where his prerogatives began; and the House declaring that the privilege was absolute for any matter touching Parliamentary business.²⁰ The battle culminated when Sir John Eliot and other members who opposed funding a needless and bloody war overseas were

¹⁹ See *id.*, at 160-161:

"The line taken by the Tudor and Stuart sovereigns on this question of freedom of speech shows that the House had to struggle not merely for latitude of discussion, but for the existence of its own initiative in legislation and in deliberation. The Crown maintained and the House denied that the Commons were summoned merely to vote such sums as were asked of them, to formulate or to approve legislation or topics of legislation submitted to them, and to give an opinion on matters of policy if, and only if, they were asked for one"

²⁰ The methods of intimidation employed by the Crown, and protested by Parliament as a breach of privilege, took a wide variety of forms. In addition to the institution of criminal proceedings, the Crown's arsenal also included issuing direct orders to the Speaker to cease debate on sensitive topics, bribing corruptible Members of Parliament, summarily arresting others and arraigning them before the Star Chamber or committing them directly to the Tower, and spreading rumors of Royal displeasure and threats of retaliation. See generally T. P. Taswell-Langmead, *English Constitutional History*, 318-321, 336-337, 541-579, 770-772 (4th ed. 1890).

Secret, inquisitorial bodies with contempt power—the equivalent of the modern-day investigating grand jury—also were used as instruments of harassment. For example, in 1575, Peter Wentworth was interrogated about his speeches by a special committee, composed of state ministers. When he refused to answer on the ground that he could not be questioned outside of Parliament, he was committed to the Tower for contempt. See Cella, *supra*, at 6-10; Taswell-Langmead, *supra*, at 490-494.

prosecuted in 1629 for making "seditious" speeches in the House.²¹ The judges of the King's Bench rejected the plea of privilege by reverting to its earlier and limited applications as excluding "seditious" speeches.²² The im-

²¹ Taswell-Langmead, *supra*, at 557-560, 578-579.

²² *Proceedings Against Sir John Eliot, Denzil Hollis and Benjamin Valentine*, 3 How. St. Tr. 294. It is noteworthy that Eliot's counsel based his plea to the court's jurisdiction in a functional approach, arguing that the privilege applied even to speeches characterized as "seditious" because of the accusatory and inquiring functions of Parliament:

"... The words of the speech themselves contain several accusations of great men; and the liberty of accusation has always been parliamentary So it is the duty of the commons to enquire of the Grievances of the subjects, and the causes thereof, and doing it in a lawful manner . . . [and] parliamentary accusation, which is our matter, is not forbidden by any law

"Members of the House may advise of matters out of the House: for the House itself is not so much for consultations, as for propositions of them." *Id.*, at 295, 296, 298.

He also relied on the judicial origins of the privilege:

"Words spoken in Parliament, which is a superior court, cannot be questioned in this court, which is inferior." *Id.*, at 296.

In rejecting the plea, the judges addressed themselves *only* to the latter proposition. Justice Whitlocke said:

"[W]hen a burgess of parliament becomes mutinous, he shall not have the privileges of parliament. In my opinion, the realm cannot consist without parliaments, but the behaviour of parliament-men ought to be parliamentary. No outrageous speeches were ever used against a great minister of state in parliament which have not been punished. If a judge of this court utter scandalous speeches to the state, he may be questioned for them before commissions of Oyer and Terminer, because this is no judicial act of the court." *Id.*, at 308.

And Chief Justice Hyde added:

"As to what was said, that an inferior court cannot meddle with matters in a superior court; true it is . . . but if particular members of a superior court offend, they are oft-times punishable in an inferior court" *Id.*, at 307.

prisonment of Eliot and others crystallized opposition to the despotic rule of Charles I and was a significant factor leading to the Civil War and the execution of the King.²³ In 1641, the House of Commons declared the trial to be a breach of the speech and debate privilege,²⁴ and there followed a series of resolutions and acts by both Houses, before and following the Restoration, guaranteeing the privilege in the broadest terms.²⁵

During this entire period of constitutional development, Parliament never defined the outer limits of its privileges with particularity. The free speech privilege was not a static concept or an end in itself, but an essential mechanism for the protection of the legislature's changing functions. Even prosecutions such as Eliot's would not have been condemned a century earlier; it was only when Commons seriously asserted its right as the Grand Inquest that "restrictions hardly noticed before were bitterly resented; and the illusion of freedom gradually vanished from men's

²³ See Cella, *supra*, at 11-12:

"This decision was extremely unpopular throughout the country. It was one of the most significant factors in the growing opposition to King Charles I and his policies. It made a lasting impression upon the House of Commons which never forgot this unwarranted invasion of their ancient rights, privileges and liberties."

See also *Tenney v. Brandhove*, *supra*, at 372; Wittke, *supra*, at 103-106.

²⁴ This resolution is reprinted in 3 How. St. Tr. 310-311. The year 1641 was the first opportunity for the House to invalidate Eliot's conviction and establish the absolute scope of the privilege since Charles I governed dictatorially without Parliament from 1630 until the Civil War. Taswell-Langmead, *supra*, at 600-606.

²⁵ For example, in 1667, both Houses resolved that the special act in *Strode's Case* was a general law. See 3 How. St. Tr. 314 *et seq.* In 1668, the House of Lords reversed the convictions of Eliot, Hollis and Valentine. Taswell-Langmead, *supra*, at 378, n. 55.

minds."²⁶ As the circumstances and need for the privilege were fluid, so, too, was the privilege itself; and, as Blackstone has observed, transient definitions would have been counter-productive:²⁷

"Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. If, therefore, all the privileges of parliament were once set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member, and violate the freedom of parliament. The dignity and independence of the two houses are therefore, in great measure preserved by keeping their privileges indefinite.

The functional approach to the privilege did not end with the Restoration, and there followed events of particular relevance to this case. By the time of James II's accession in 1686, the House of Commons asserted the right to publish its proceedings to the country at large as a corollary of its power to investigate misbehavior by the Executive. The King reacted bitterly and ordered the prosecution of Sir William Williams, Speaker of the House,

²⁶ Neale, *supra*, at 175. In this regard, it is noteworthy that prior to the institution of the bill procedure and the expansion of Commons' jurisdiction, there were only three protests by the House respecting breach of the speech and debate privilege—*Harey's Case* in 1399, *Young's Case* in 1455 and *Strode's Case* in 1521. See Wittke, *supra*, at 23-25.

²⁷ 1. Blackstone's Commentaries 164.

who, with permission of the House, had published and circulated a committee report, written outside of Parliament but introduced into the parliamentary records and then redistributed by Williams, which accused the King and his relatives and closest advisors of a plot jeopardizing the religious freedom of the country. The reaction to this prosecution in Parliament and the country at large was intense, and, as we shall discuss in detail, *infra*, 67-75, was the primary cause of the exile of James II and the passage of the Bill of Rights, which stated, in the broadest language:

“That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.”

1 W. & M., Sess. 2, c. 2.

Finally, as the fear of executive intrusion gradually lessened and the representative character of Parliament was enhanced by the democratic reforms of the late eighteenth century, the House removed its veil of secrecy²⁸ and recognized its obligation to inform the public fully of the workings of government. This in turn led necessarily, albeit after some dispute with the courts, to the extension of the free speech privilege to individual members who, with or without the permission of the House, circulated to the public reports of their speeches and other proceedings.²⁹ In this process, too, the privilege followed and then embraced the changing realities of the legislative function, at first to preserve the secrecy of legislative debates and later to in-

²⁸ Since 1641, a standing rule of the House of Commons had forbade individual members from publishing parliamentary proceedings. See H. T. E. May, *Constitutional History of England* 34 (10th ed. 1891).

²⁹ This is discussed in detail in our brief, *infra*, section I.C.

sure the free flow of information from Parliament to the people.

3. *The Intent of the Framers.*

The framers of our Constitution were well aware of this history and of the necessity for a functional approach to the privileges of Congress. They consciously excluded certain privileges and limited others, which had derived historically from the judicial character of Parliament and had, or should have, fallen into desuetude.³⁰ The speech and debate privilege, however, was viewed as essential to republican government, as "an important protection of the independence and integrity of the legislature." *United States v. Johnson, supra*, at 178. Madison's motion in the Convention to delineate specifically this privilege was defeated,³¹ and the language of the Constitution, therefore, was "framed in the broadest terms." *Id.*, at 182-193.³²

³⁰ See Jefferson, *Manual of Parliamentary Practice*, § 3. Thus, for example, the privilege of the legislature to keep its proceedings secret was barred by Article I, section 5, of the Constitution, which requires the publication of a journal. The unlimited privilege from arrest and civil process was severely curtailed in Article I, section 6. And Congress was not given a general privilege of the contempt power, for, as this court observed in *Kilbourn v. Thompson, supra*, at 183-189, this privilege obtained only in bodies of a judicial character.

³¹ Cella, *supra*, at 14-15.

³² Apparently recognizing that the Convention acted properly in rejecting his proposal for a static definition of the privilege, Madison later advocated the functional approach:

"In the application of this privilege to emerging cases, difficulties and differences of opinion may arise. In deciding on these the reason and necessity of the privilege must be the guide." 4 Writings of James Madison 221 (Hunt ed. 1910).

A functional interpretation of the privilege is also necessitated by a unique purpose for it which was not present in England. "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson, supra*, at 178. This purpose would be vitiated, and the "practical security" which the Clause is designed to afford, *id.*, at 179, would be rendered a rhetorical abstraction, if the courts construe the Clause in its narrowest historical setting. This conclusion follows inescapably from this basic purpose of the Clause in our scheme of government; as stated early in our history by James Wilson:

"In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense." *1 Works of James Wilson* 421 (McCloskey et. 1967).³³

And this Court has made it perfectly clear that the "powerful" of whom Wilson spoke refers primarily to the executive branch. *United States v. Johnson, supra*, at 181-182.

The content of the Clause cannot, therefore, be frozen to the burgesses of five hundred years ago, or to the events leading to the execution of Charles I, or even to conditions prevalent in 1787. As an effective instrument of separation of powers, the Clause must be shaped, as it always

³³ Quoted in *Tenney v. Brandhove, supra*, at 373.

has been,³⁴ by the present-day functions of Congress in our system of representative government, and must protect against intrusions by the executive and judiciary which "threaten those consequences which the Framers deeply feared." Cf. *School District of Abington Township, Penn. v. Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring) (emphasis added). In this regard, we cannot improve on Cella's cogent analysis:

"If the doctrine of legislative privilege is to perform its traditional function in our system of separation of powers of permitting legislators to carry out their increasingly onerous responsibilities without fear of prosecution or harassment from the executive and judicial branches, then it must be applied broadly and liberally to effectuate its intended purpose. In its application, it must be geared to the realities of the manner in which a modern legislative system operates. It cannot afford to be permanently attached to the ways in which legislatures discharged their responsibilities when the Republic was founded or, for that matter, even fifty years ago.

"Modern legislatures have had to adopt their techniques of operation to the increasingly complex society within which they must function. New techniques and new methods of procedure have gradually evolved. The doctrine of legislative privilege cannot remain

³⁴ The evolutionary and functional nature of legislative privilege was also present in the American colonies. See generally M. Clarke, *The Parliamentary Privilege in The American Colonies* (1943). For example, given the historical setting it is not surprising that the Speakers Petition in all of the colonies claimed the right of access to the colonial governor at all times and demanded that he should not take cognizance of their proceedings except as was revealed in formal reports; and other privileges developed according to local needs. See *id.*, at 70-82, 227-234.

"static if it is to remain meaningful." *Cella, supra*, at 34.

In sum, there is no warrant in English history, or the prior decisions of this Court, or in the historical application of the Clause, or in the purposes for its inclusion in the Constitution, to warrant the narrow approach taken by the Court of Appeals.³⁵ The very opposite is true: the free speech privilege evolved in a functional manner to give practical security to legislators who criticize the administration of domestic and foreign policy by the Executive. The facts giving rise to this case fall within the mainstream of the historical purposes for the privilege.

In the section which follows, we shall show that the publication of committee reports is commonly done in Congress and performs an important function in representative government. And when, as here, the report involved is critical of executive conduct, its publication and distribution to the people is a classic example of the well-recognized "informing function" of Congress. This, combined with fundamental principles of separation of powers, require that such publication be privileged legislative activity.

A considerable amount of illumination is also provided by examining the intent of the framers, for there is sub-

³⁵ The arbitrary line drawn by the Court of Appeals at the deliberative process of Congress, does have the apparent virtue of being applied easily to any state of facts. We submit that the price for this line—jeopardizing the independence and integrity of Congress—is far too high. Moreover, even this apparent simplicity of operation is deceptive. The court noted, and did not dispute, our argument that "communicating with the electorate is essential to effective deliberation because it elicits responses to guide (a Congressman's legislative decisions and because it helps to put pressure upon other legislators." (P.W.C. 9a & 10a.) It simply dismissed the argument as "staggering." (*Ibid.*)

stantial evidence that they intended to immunize from executive and judicial inquiry—and specifically from inquiry by the grand jury—all forms of communication between a congressman and the public in the exercise of the informing function. This material is set out in section I.C. In section I.D. following that, we trace the precise historical development in England on this issue, showing that the immediate purpose of the inclusion of the privilege in the English bill of rights was to reverse a judicial decision holding publication of committee reports to be outside the privilege. We also examine in that section subsequent English judicial decisions establishing that the publication of speeches and reports by members of Parliament is privileged from judicial inquiry.

B. THE PUBLICATION OF COMMITTEE RECORDS IS GENERALLY DONE BY CONGRESSMEN AND IS ESSENTIAL TO THE PROPER FUNCTIONING OF REPRESENTATIVE GOVERNMENT.

In considering whether any given practice falls within the functional standards established in previous cases, it is of course obvious that the privilege against inquiry does not extend to all of a congressman's actions simply because of his status. Clearly, for example, crimes such as assault and battery, armed robbery and bribery are beyond the scope of the privilege, even if fortuitously committed within the walls of the Capitol. See *United States v. Johnson, supra*.³⁶ Two benchmarks are implicit in

³⁶ It is, of course, possible that in such cases the privilege might operate to bar the admissibility of evidence concerning a congressman's "legislative acts . . . [and] his motives for performing them." *United States v. Johnson, supra*, at 185. See also *Ex parte Wason*, L.R. 4 Q.B. 573 (1868). In this sense, the speech and debate privilege would operate testimonially, in a manner akin to the privilege against self-incrimination of the attorney-client privilege.

past decisions. First, the court should ask whether the practice in question is necessary to fulfill any of the goals of representative government as established by the Constitution. Second, guidance is available in the actual workings of Congress to determine whether a practice is widely utilized by members of Congress in the performance of their duties; in other words, whether it is "generally done . . . by . . . its members in relation to the business before it."

1. *The Informing Function.*

It is clear that the publication of speeches and committee records about the workings of government and their dissemination to the electorate meets each of these criteria. The scheme of representative government envisaged by the Constitution presupposes an obligation on the part of a legislator to inform his constituents and colleagues about vital matters concerning the administration of government. This Court recognized the central importance of this informing function in contrasting it with exposure for exposure's sake:

"We are not [here] concerned with the power of Congress to *inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government*. That was the only kind of activity described by Woodrow Wilson in *Congressional Government* when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' *Id.*, at 303. *From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature. See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 168-194.*" *Watkins v. United*

States, 354 U.S. 178, 200, fn. 33 (1957). (Emphasis added.)

The informing function plays a key role in our system of separation of powers, for it insures that the administration of public policy by the innumerable non-elected officials of the executive department is fully understood by the legislature and the people. As Woodrow Wilson wrote in his classic study of Congress:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct." (Emphasis added.) W. Wilson, *Congressional Government*, 303 (1885).

In contemporary times, as much as when the Constitution was written, the informing function acts to preserve the basic character of our constitutional government. Departing drastically from the theories of government in Europe, the framers believed that ultimate power must always rest in the people. As Madison, who is appropriately called the Father of the Constitution, said: "The people,

not the government, possess the absolute sovereignty."³⁷ For this system to be viable, the people must be informed fully of the workings of government so that they may be able meaningfully to exercise their constitutional rights to vote intelligently and to the "free public discussion of the stewardship of public officials."³⁸ This necessarily imposes a *duty* on congressmen to inform the electorate for, to borrow again from the language of Woodrow Wilson:

"The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration . . .

"Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body (Congress) which kept all national concerns suffused in a broad daylight of discussion." Wilson, *supra*, at 303, 297.

The centrality of the informing function to democratic institutions has been emphasized even by those political theorists who, while doubting the capacity of legislative bodies to legislate; nonetheless believed that by overseeing the administration they would make an essential contribution to the protection of liberty:

³⁷ IV Eliot's Debates 569 (1800). See also I Works of James Wilson 310 (McCloskey ed. 1967):

"The order of things in Britain is exactly the reverse of the order of things in the United States. Here, the people are the masters of the government; there, the government is the master of the people."

³⁸ *New York Times v. Sullivan*, 376 U.S. 254, 275 (1964).

"The proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to censor them if found condemnable This is surely ample power, and security enough for the liberty of the nation." J. S. Mill, *On Representative Government* 42 (London: Longmans, Green, Reader and Dyer 1878).

It has been fortunate for the country that, as this Court noted in *Watkins, supra*, congressmen have always "assiduously performed" this kind of informing function. In the article there cited by the Court, Dean Landis reviewed Congress' historic exercise of this obligation in investigating and exposing bad judgment and corruption in the executive branch.³⁹ Perhaps more than any example of investigation and publicity discussed by Dean Landis, a member of Congress who informs the electorate and the rest of Congress about the process by which the Executive took

³⁹ And Dean Landis emphasized this function as an inherent part of the legislative process in representative government:

"[The Congressman's] duty is to acquire [knowledge about administration], partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. The electorate demands a presentation of the case The very fact of representative government thus burdens the legislature with this informing function

" . . . That duty, however, is not distinct from the legislative process, but implied and inherent in it." Landis, *supra*, at 205-206 & n. 227.

the nation into a controversial war is engaging in legislative activity in the most classic sense of the term.⁴⁰

On a broader plane, the publication of congressional committee proceedings and their dissemination to the electorate play other important roles in representative government. The heart of representative democracy is the communicative process between the people and their agents in government. By making widely available accurate reports of these proceedings, congressmen enlighten the electorate and at the same time insure that the people will inform them and their colleagues of their well-considered views on pending or potential legislation. Practically every careful student of Congress has observed this process and has noted as well that committee hearings and the publication and distribution of speeches and committee reports form the principal avenue for achieving it.⁴¹ They thus agree with Harold Laski that:

⁴⁰ It is certainly relevant in this regard that although the war in Vietnam was never declared by Act of Congress, there is a considerable constitutional dispute as to whether Congress nevertheless authorized it and/or knowingly acquiesced in it.

⁴¹ See, e.g.; C. L. Clapp, *The Congressman: His Work as He Sees It* (1963) (Clapp was then head of the Governmental Studies Staff of Brookings):

"The principal educational tools of the congressman are his newsletter, radio and television programs, speaking engagements, and letters in response to constituent correspondence. There is considerable concern within the Congress that the general public is not well informed regarding the way the legislative body functions, and some members consciously seek to educate their districts in this area as well as about specific public issues." (P. 100.)

"Hearings also inform the public and interested groups that a particular measure is under consideration, thus providing the voters with an opportunity to make their wishes known in advance of congressional action. In making this point one Congressman said: 'the hearings serve a very useful purpose because, as a whole, they are open hearings, covered by mem-

"A legislature can criticize, it can ventilate grievances; its power to investigate through committees is

bers of the press and given considerable publicity. They constitute one of the few places where any publicity goes out over the country that a bill is moving along. By informing people that bill has reached the point of hearings, correspondence is stimulated before you reach a vote on it." (P. 265.)

(Emphasis in original.)

"Indeed, although some congressmen consciously pursue the 'educator' role more actively than others, there are few who do not in some measure seek to enlighten the people they represent." (P. 101.)

J. Bibby and R. Davison: *On Capitol Hill* (1967), (Bibby is a professor at the Univ. of Wisconsin, and Davison is a professor at Dartmouth):

"The activities of Congress are 'news' and Congress is a prime subject for national news media coverage. Because of this capacity to generate publicity, Congress performs the functions of *Public education*. That is, Congress through its deliberations informs the public on issues and raises the level of public interest in current problems. With its well-publicized committee hearings and floor debates and the press releases that constantly flow from members' offices, there are few matters that do not receive congressional publicity. Often the publicity surrounding congressional activities has helped crystallize public opinion on issues and has thus facilitated the passage of new legislation . . .

"Congress is thus more than an object of public opinion. Its relation to the electorate is reciprocal. Influenced by the voters, it is also constantly engaged in current issues and in influencing public thinking." (P. 13.) (Emphasis in original.)

J. P. Harris, *Congress and The Legislative Process* (1967) (Harris is Professor of Political Science, University of California at Berkley):

"The informing function is performed today largely through committee hearings on important legislative proposals and through congressional investigation . . . it is the proceedings of the major committees rather than the floor debates that attract greatest attention." (P. 41.)

E. S. Griffith, *Congress: Its Contemporary Role* (1956) (Griffith was then Director of the Legislative Reference Service):

"The political education of the public is one of the recognized functions of Congress." (P. 185.)

invaluable; and, not least, as it fulfills these tasks it provides a process of public education which is pivotal

"More frequently than not such political education is a by-product rather than the chief end of Congressional behavior. The chief ends remain: to put through a policy or program, to solve a problem, and to be re-elected. The education of the electorate is chiefly valued as it contributes to one of these, but regardless of whether or not it is consciously sought, it nevertheless takes place continuously." (P. 185.)

"Second only to the publicity attending floor debate is that accorded the committee hearings To the serious student, the records of the hearings are mines of information. Here are set out in detail, and subjected to cross-examination, much of the basic data relating to the nature of the economy, the underlying factors in foreign relations, the future of our resources, the strategy of national defense, the problems in labor relations, and many another field of importance and interest . . . a number of the committees deliberately plan some of their hearings with the education of the public in mind and choose subjects and witnesses accordingly." (Pp. 186-187.)

"There is high hope that this particular function of Congress of political education will continue to be performed, as it has been of late, with increasing responsibility, intelligence, and effectiveness. It lies near the heart of the democratic way." (P. 189.)

The Reorganization of Congress, a Report of the Committee on Congress of the APSA (1945):

"The other three functions of Congress today are exercised, in one manner or another; every day it is in session. They are:

1. The legislative function . . .
2. The public opinion function—to reflect, express, and with the aid of the press, to inform and guide public opinion on the great issues of the day. With the decline of Congress as an original source of legislation, this function of keeping the government in touch with public opinion and of keeping the public opinion in touch with the conduct of government becomes increasingly important. Congress no longer governs the country; the Administration in all its ramifications actually governs. But Congress serves as a forum through which public opinion can be expressed, general policy discussed, and the conduct of governmental affairs exposed and criticized." (Pp. 13-14.)

This view is shared by analysts on all parts of the political spectrum. Compare, e.g., Laski, *supra*, with J. Burnham, Congress

to democratic government." The American Presidency, quoted in R. Bolling, *House Out of Order* 29 (New York, E. P. Dutton Co. 1965).

Also, in examining what is "generally done" in Congress, it is pertinent to note that congressmen understand both the utility and necessity of holding committee hearings and publishing their proceedings in order both to enlighten the electorate and affect future legislation.⁴² Congress has, accordingly, provided a variety of financial and

and the American Tradition 233-234 (1959). See also D. Truman, *The Governmental Process* 372-377 (1951):

And Walter Bagehot observed the same process at work in the House of Commons:

"The third function of Parliament is what I may call preserving a sort of technicality even in familiar matters for the sake of distinctiveness—the teaching function. A great and open council of considerable men cannot be placed in the middle of a society without altering that society. It ought to alter it for the better. It ought to teach the nation what it does not know.

"Fourthly, the House of Commons has what may be called an informing function Since the publication of the Parliamentary debates a corresponding office of Parliament is to lay these same grievances, these same complaints, before the nation, which is the present sovereign. The nation needs it quite as much as the King ever needed it Any notion, any creed, any feeling, any grievance which can get a decent number of English members to stand up for it, is felt by almost all Englishmen to be perhaps a false and pernicious, but at any rate possible—an opinion to be reckoned with. And it is an immense achievement." *The English Constitution* 152-153 (1963).

⁴² See, e.g., *Clapp, supra*, at 89-100, containing interviews with a cross section of congressmen; K. G. Olsen and C. E. Bennett, *The Service Function of the United States Congress*, in *Congress: The First Branch of Government* 345-353 (1969); V. Hartke, *You and Your Senator*, 202, 233-234 (1970); W. L. Marrow, *Congressional Committees* 163-165 (1969); D. G. Tacheron and M. K. Udall, *The Job of a Congressman* 117, 280-288 (1966).

other support for communications between a legislator and the public.⁴³ One study revealed that a majority of congressmen send newsletters to the public on a periodic basis,⁴⁴ and it has also been found that congressmen spend a substantial portion of their time in informing the electorate.⁴⁵

The informing function is a fact of life in the modern Congress, and it surely cannot be dismissed cynically as a mere device for congressmen to woo votes. Many congressional hearings have been held and massively publicized in order to enlighten the electorate about activities which were inimical to the general welfare and resulted in public pressure for the consequent passage of important legislation. A small sample might include the famous in-

⁴³ "Such provisions include the franking privilege for sending letters, the telephone and telegraph allowance, the stationery allotments, use of the Joint Senate-House Radio-Television facilities, free distribution of the Congressional Record, favorable prices on personal reprints from the Record, and free use of the folding rooms which collate, fold, stuff, package and mail Congressional newsletters, polls, and other communications directed to constituents." C. F. Hawver, *The Congressman's Conception of His Role* 59 (1963). See also Clapp, *supra*, at 59-60, 89; J. Harris, *supra*, at 202, 234.

⁴⁴ "In 1962 a confidential House survey showed that 231 of 437 members of the House used franked-mail newsletters, mailed weekly or on another periodic basis. Of the 231, some 15 Congressmen sent out 400,000 or more pieces of free mail each during the first seven months of the year while 19 sent out 300,000 to 400,000 pieces In the middle range, well scattered between 30,000 and 300,000 pieces, were 168 (about 73%), while only 29 sent out 5,000 pieces or less." Hawver, *supra*, at 56. The Post Office has reported that the amount of franked mail increased from 44.9 million pieces in 1955 to 63.4 million in 1958 and 111 million in 1962. Clapp, *supra*, at 59.

⁴⁵ See, e.g., the results of congressional surveys in Tacheron and Udall, *supra*, at 280-288; Olsen and Bennett, *supra*, at 351-353.

quiries conducted by the Kefauver committees on organized crime and on dangerous drug practices, by the O'Mahoney committee on the concentration of economic power, by the Senate rackets subcommittee on the regulation of internal operations of labor unions, by the La Follette civil liberties committee, by the 1966 Senate committee hearings on automobile safety, and by the Fulbright committee on the Reconstruction Finance Corporation.⁴⁶ With respect to investigations of executive conduct, one might add the Wheeler-Walsh exposure of scandal in the Harding administration,⁴⁷ the Truman-Mead hearings on national defense and, of course, many more recent hearings on the origins and conduct of the Vietnam War.⁴⁸ The value of congressional investigations and the publicity they generate was stated in powerful terms by Senator (later Mr. Justice) Hugo Black, who was catapulted into national prominence by his exposures of corruption in the utilities lobby and maladministration of the merchant marine:⁴⁹

"They have formed the basis of our most important legislation . . .

"But most valuable of all, this power of the probe is one of the most powerful weapons in the hands of

⁴⁶ See generally Harris, *supra*, at 4, 233; Bibby and Davison, *supra*, at 13.

⁴⁷ See Frankfurter, *Hands Off the Investigators*. The New Republic, May 21, 1924, at 329-331.

⁴⁸ For example, the Fulbright hearings in 1966 were not only televised in their entirety but later printed privately and distributed widely to the public. See n. 111, *infra*.

⁴⁹ See Frank, Hugo L. Black, in 3 *Justices of the Supreme Court* 2328-2329 (Friedman & Israel ed. 1969). Of the latter investigation, Nicholas Johnson wrote: "He stimulated the nation's conscience, creating demand for Congressional maritime reform." Senator Black and The American Merchant Marine, 14 U.C.L.A. L. Rev. 399 (1967).

the people to restrain the activities of powerful groups who can defy every other power.

"Public investigating committees, formed by the people themselves or from their public representatives, exist always in countries where the people rule . . . that is because special privilege thrives in secrecy and darkness and is destroyed by the rays of pitiless publicity." Black, *Inside a Senate Investigation*, 172 *Harper's Monthly* 275, 285-286 (Feb. 1936).

An examination of the operations of Congress, therefore, settles beyond doubt that the informing function, effectuated in large part by the publication of speeches and committee records, is activity which is "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn, supra*, at 204, and is clearly "related to the due functioning of the legislative process," *United States v. Johnson, supra*, at 182.⁵⁰ And it thus falls within the protection of the Speech or Debate Clause.⁵¹

⁵⁰ The publication and widespread circulation of committee reports is often accomplished with the assistance of private printers. See pp. 85-88, *infra*.

⁵¹ In light of a misconception by the Court of Appeals (P.W.C. 9a), we wish to reiterate that we do not urge and never have urged that simply because a number of congressmen are said to engage in a certain kind of conduct it necessarily follows that the conduct is within the ambit of the clause. For example, intervening before an executive agency, on behalf of a constituent, with respect to a matter pending before it for decision is not privileged. See *United States v. Johnson, supra*, at 179. Such conduct is not necessary to fulfill any goal of representative government since it involves a matter committed by law to a coordinate branch of government for determination. Moreover, it is not customarily done—at least not to the same extent as the informing function, inasmuch as many congressmen believe such conduct to be improper and refuse to engage in it. *Galloway, supra*, at 202-205.

A similar functional analysis led this Court to hold in *Barr v. Matteo*, 360 U.S. 564 (1959) and *Howard v. Lyons*, 360 U.S. 593 (1959), that the judicially-created doctrine of executive privilege protects the issuance and widespread circulation of news releases by the thousands of subordinate officials of the executive department. The Court there held, applying a functional approach, that while such activity was not statutorily mandated it was nonetheless customarily done and related to the duties of the office:

"It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty. That petitioner was not *required* by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank . . . where the concept of duty encompasses the sound exercise of discretion." 360 U.S. at 575. (Emphasis in original.)

And Mr. Justice Black concurred on the ground that the public had a right to be informed about the operation of agencies:

"The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of the government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends,

Very few congressmen go beyond sending a letter of inquiry to the agency. Of course, if a congressman believes that an injustice has been done by an agency, he has adequate legislative tools at his disposal—he may hold hearings, expose the injustice, and propose legislation.

of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important." *Id.*, at 577.

This reasoning, of both the majority⁵² and concurring opinions, applies with even greater force to the privileges of elected members of Congress, which derive from the Constitution itself. And congressmen *are required*, in the constitutional sense, to speak out and enlighten the electorate.

2. *The Separation of Powers Context of this Case.*

The issue of the degree to which the informing function of Congress is encompassed within the scope of the Speech or Debate Clause is presented herein with striking clarity. What is now before this Court is a classic separation of powers case. There is no claim here, in contrast to some civil cases, that a member of Congress used the authority of his office to violate willfully an individual's constitutional rights. That kind of situation draws into play the obligation of the courts to protect individual rights, and there may very well be circumstances where no other means is available to safeguard the preferred constitutional rights of the individual, and where the judiciary will therefore be compelled to draw the balance on the side of the individual. Cf. *Hentoff v. Ichord*, 318 F. Supp. 1175 (D. D.C. 1970); *Doe v. McMillan*, F. 2d (D.C. Cir. 1972) (dissenting opinion).

In this case, on the other hand, the judiciary is not being asked to balance the rights of individuals, including pre-

⁵² Mr. Justice Stewart joined in this analysis but did not agree that there was any factual support for any conclusion other than that Barr was seeking merely to defend his own reputation. *Id.*, at 586.

ferred constitutional rights, against the privileges of members of Congress; to the contrary, the executive branch of government has come to the courts, seeking the aid of the courts' compulsory process and resulting contempt power, and claimed that it may determine what a member of Congress may tell his constituents about matters of overwhelming public concern. It is no exaggeration to say that this claim of the executive branch challenges the fundamental character of our tripartite system of government.

The constitutional evil which would result from denying the privilege's applicability to the informing function of Congress is magnified when this is done at the behest of the Executive and with respect to material which is critical of executive behavior. As this Court has emphasized, the central purpose of the Speech or Debate Clause is "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Johnson, supra*, at 181. If the executive branch may, at will, institute grand jury proceedings and interrogate witnesses about Senators' publications of their speeches and committee reports which they send to the electorate, it will possess the power to isolate effectively all but the most courageous legislators from their constituents. If such a rule applies, congressmen will have to watch what they say to the people—in press releases, newsletters and anything spoken outside of the four walls of the Capitol—and they will inescapably be inhibited out of fear of harassment, grand jury inquisitions and even prosecutions. Yet if the Speech or Debate Clause means anything, it is that courts and prosecutors are not referees over what congressmen may say to the people or how they may say it.

The Court of Appeals believed that the "consequences" of acknowledging the right of congressmen to inform the electorate would be "staggering" and, in support of this proposition, hypothesized a series of strained examples of

possible abuse. (P.W.C. 10a.) It is clear that the hypothetical possibility of abuse of congressional power "affords no ground for denying the power." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

The cogent answer to this sort of "parade of horrors" argument⁵³ was given by Mr. Justice Harlan in *Barr v. Matteo*, *supra*, at 576:

"We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good. . . . We think that we should not be deterred from establishing the rule which we announce today by any such remote forebodings."

This reasoning supported the extension of the executive privilege to all forms of utterances, including publication and distribution of news releases, even through thousands of diverse, subordinate and non-elected officials were cov-

⁵³ The framers, who gave congressmen the power to set their own salaries, seemed to have more faith than the Court of Appeals that Congressional power would not be perverted for commercial gain.

ered. It would seem, *a fortiori*, to govern the scope of the constitutional privilege of elected members of Congress. It is appropriate, in this regard, to recall Mr. Justice Holmes' famous statement in *Missouri, Kentucky & Texas Ry. Co. v. May*, 194 U.S. 267, 270 (1904):

"[I]t must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Moreover, the Court of Appeals' hypothetical approach may be compared with *Hearst v. Black*, 87 F. 2d 68 (D.C. Cir. 1936), where the plaintiff filed a complaint alleging that personal telegrams had been seized illegally and were to be exposed to the general public by a Senate committee. The Court dismissed the complaint on the principles of separation of powers. It is noteworthy that the defendant in that case was Senator (later Mr. Justice) Hugo Black, who was seeking to expose corruption in the utility lobbies and their bribery of newspapers, including the plaintiff Hearst Publishing Co., for which acquisition and publicity of these telegrams were essential. Yet if the Court of Appeals' theory in this case were correct, Hearst could have successfully harassed Senator Black in a court proceeding by merely alleging illegal acquisition and thereby hindered the investigations. Thus, in considering the parade of horrors, it is appropriate to quote the wise statement of Judge Learned Hand in *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949):

"[I]f it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all

officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

This certainly applies with equal force to the constitutional privilege of congressmen, who are "to be protected from the resentment of everyone, however powerful," I Works of James Wilson, *supra*, at 421, particularly the executive branch, *United States v. Johnson*, *supra*, at 181. Finally, in the unlikely event that a member of Congress does engage in such reprehensible conduct as hypothesized by the Court of Appeals, he will be held accountable—by the House and by the people at the polls. What Mr. Justice Frankfurter said in *Tenney v. Brandhove*, *supra*, at 378, is directly on point to this case:

"In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."

C. THE FRAMERS INTENDED THAT THE CLAUSE WOULD OPERATE AS A BAR AGAINST EXECUTIVE AND JUDICIAL INQUIRY INTO A CONGRESSMAN'S COMMUNICATIONS TO THE ELECTORATE.

1. *The Cabell Grand Jury Investigation and Jefferson's Protest.*

There is substantial evidence that the privilege of the Speech or Debate Clause was intended by the framers to

protect from inquiry by the executive and judicial branches, including the grand jury, *all* communications from a congressman to his constituents. This was certainly the view expressed unambiguously by Thomas Jefferson and James Madison, two of the architects of our Constitution, with respect to an event which is practically indistinguishable from the case at bar. In 1797, a federal grand jury in Virginia investigated the conduct of several members of Congress, including Congressman Cabell of Virginia, in sending newsletters to their constituents critical of the administration's policy in the war with France. The administration believed the newsletters to be "seditious," to contain information valuable to the enemy, and to threaten the security of the Nation.

The grand jury reported:⁵⁴

"We, of the grand jury of the United States, for the district of Virginia, present as a real evil, the circular letters of several members of the late Congress, and particularly letters with the signature of *Samuel J. Cabell*, endeavoring, at a time of real public danger, to disseminate unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom; and to increase or produce a foreign influence, ruinous to the peace, happiness, and independence of these United States."

Thomas Jefferson, who was the Vice-President of the United States and the leading contemporary expert on congressional privilege,⁵⁵ immediately drafted a long essay, in the form of a protest to the Virginia House of Dele-

⁵⁴ 8 Works of Thomas Jefferson 325 (Ford ed. 1904).

⁵⁵ While Vice President, Jefferson compiled the authoritative *Manual on Parliamentary Practice*.

gates signed by himself and other leading citizens of the district represented by Cabell, condemning the grand jury's investigation as a blatant violation of the congressional privilege and of the doctrine of separation of powers. The draft was forwarded to Madison who joined in it and suggested certain minor changes.⁵⁶ These changes were then adopted by Jefferson and the protest was sent to the House of Delegates. This eloquent protest bears so directly on the present case that we believe it merits quotation at unusual length. Its significance goes beyond even the stature of its authors and the factual identity with the case at bar; this protest, line by line, is the most cogent analysis in existence of the purposes and scope of the Speech or Debate Clause, as well as the limitations the Clause places on grand jury investigations. The protest is as follows:⁵⁷

"... that in order to give to the will of the people the influence it ought to have, *and the information which may enable them to exercise it usefully*; it was a part of the common law, adopted as the law of this land, *that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any*: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the

⁵⁶ Letter from Madison to Jefferson, August 5, 1797, in Presidential Papers Microfilm, James Madison Papers, Series I: 1796 Jan. 5—1801 June 14 (Library of Congress).

⁵⁷ 8 Works of Thomas Jefferson 322-331 (Ford ed. 1904).

proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

"That when circumstances required that the ancient confederation of this with the sister States, for the government of their common concerns, should be improved into a more regular and effective form of general government, the same representative principle was preserved in the new legislature . . . and the laws and principles remained unaltered which privileged the representative functions, whether to be exercised in the State or General Government, against the cognizance and notice of the co-ordinate branches, Executive and Judiciary.

" . . . that the said Samuel Jordan Cabell accepted the office, repaired at the due periods to the legislature of the General Government, exercised his functions there as became a worthy member, and as a good and dutiful representative was in the habit of corresponding with many of his constituents, and communicating to us, by way of letter, information of the public proceedings, of asking and receiving our opinions and advice, and of contributing, as far as might be with right, to preserve the transactions of the general government in unison with the principles and sentiments of his constituents: that while the said Samuel J. Cabell was in the exercise of his functions as a representative from this district, and was in the course of that correspondence which his duty and the will of his constituents imposed on him, the right of thus communicating with them, deemed sacred under all the forms in which our government has hitherto existed, never questioned or infringed even by Royal judges or governors, was openly and directly violated at a Circuit

court of the General Government, held at the city of Richmond, for the district of Virginia, in the month of May of this present year, 1797

“That the grand jury is a part of the Judiciary, not permanent indeed, but in office, *pro hac vice* and responsible as other judges are for their actings and doings while in office: *that for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation . . . is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive:*

“ . . . and finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the

constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short period." (Emphasis added.)

Jefferson's protest ended with a petition that the House of Delegates order the arrest and imprisonment of the grand jurors for this "great crime, wicked in its purpose, and mortal in its consequences," which not only jeopardized Cabell personally, but infringed the rights of the public.⁵⁸ In adding his complete agreement, Madison stated:⁵⁹

"It is certainly of great importance to set the public opinion right with regard to the functions of grand juries, and the dangerous abuses of them in the federal Courts; nor could a better occasion occur."

2. *The View of Other Framers.*

The object of their petition was to mobilize public opinion; the more drastic action urged in the petition became unnecessary since the grand jury withdrew the presentment.⁶⁰

Other founders shared Jefferson's view that the free speech privilege prohibited intrusions by the executive and judicial branches into communications by a congressman to the electorate about matters of public concern. James Wilson, "an influential member of the committee on de-

⁵⁸ 8 Works of Thomas Jefferson 331 (Ford ed. 1904).

⁵⁹ Letter from Madison to Jefferson, *supra*, n. 56.

⁶⁰ See Koch and Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, V William & Mary Quarterly (Third Series) 152-153 (1948); J. M. Smith, *Freedom's Fetters* 95 (1956).

tail,"⁶¹ stated the reason for the speech or debate privilege as enabling a representative of the public "to discharge his public trust" and to "be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense." I Works of James Wilson, 421 (McCloskey ed. 1967), quoted in full, *supra*, p. 33.

Wilson believed firmly that part of the "discharge of his public trust" was the right of a legislator to communicate with the people. In the Essays on the Constitution, Wilson said:

"Representation is the chain of communication between the people and those to whom they have committed the exercise of the powers of government. The chain may consist of one or more links, but in all cases it should be sufficiently strong and discernible." II. Eliot's Debates, 424 (1788).

And, to Wilson, this placed an obligation on congressmen to inform the people fully about proceedings in the Congress:

"That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the exercise of delegated power, should be adopted and patronised by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former." I Works of James Wilson, 422 (McCloskey ed. 1967).

⁶¹ *Tenney v. Brandhove*, *supra*, at 313.

Wilson's statements are characteristic of a consistent theme of the framers that our system is one of self-government and can operate effectively only when the people are given full information about what their agents in government are doing; a necessary corollary of which is that congressmen must "look diligently into every affair of government and talk much about what [they] see."⁶² Madison thus believed:⁶³

"Knowledge will forever govern ignorance. And people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."

And also, that "... the right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right." 6 Writings of James Madison, 398 (Hunt ed. 1906).

The framers were writing against the background of the experience of the English people, who for the last two centuries had been battling for increased control over their government and had finally, shortly before the Declaration of Independence, won the right to have the debates in Parliament published.⁶⁴

In addition, the framers were appreciative of the effects on public opinion and on government caused by the publicizing of debates in the colonial assemblies. Following

⁶² W. Wilson, *Congressional Government* 303 (1885), quoted *supra*, p. 38.

⁶³ Quoted in Lasswell, *National Security and Individual Freedom* 62-63 (1950). See also 4 *Papers of James Madison* 236-237 (Hutchinson ed. 1965).

⁶⁴ See generally 1 Anson (*Law and Custom of the Constitution* 158 *et seq.* (3d ed. 1897)); May, *Constitutional History of England*.

the practice of the House of Commons, the colonial assemblies had early enjoined their members from reporting their proceedings so as to preserve secrecy of operation from the Crown, or, in their situation, the Crown-appointed governors. See *Clarke, supra*, at 227-234. However, beginning around 1760, several of the assemblies repealed their secrecy rules and opened their proceedings to the public. The immediate effects in one important state, Massachusetts, have been described as follows:

"By exposing its debates to the public, the assembly offered itself to the people as an agent of public opinion far more direct and immediate than could have normally been the case before. But its action also proceeded in the reverse direction—towards the public. The publicity of debates excited interest and accentuated the sense of crisis. The members, while framing their bold policies of resistance, challenged the people to support them. The immediate public was that of Boston: and this was of no small significance, since it was the Boston mob which executed the most provocative acts of violence and resistance, which could terrorize reluctant representatives from country towns, and whose hearts and minds could so effectively be stirred to mutiny and rage." J. R. Pole, *Political Representation in England and the Origins of the American Republic*, 70-71 (London: MacMillan, St. Martin's Press, 1966).

3. *The Publication Requirement of Article I, Section 5.*

A confluence of these factors—rooted both in history and political theory—convinced the framers that the obligation of Congress to inform the public should be declared in the Constitution. In order to prevent Congress from ever imitating the ancient practices of the House of Commons and

enacting a standing rule against publication, the Constitution requires, in Article I, section 5, that:

"Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal."

Clearly, the reason for this publication requirement was, not so much for the benefit of the members themselves, but to insure that congressmen fulfill their obligation to inform the public. As this Court has stated, the purpose of section 5 is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents." *Field v. Clark*, 143 U.S. 649, 670 (1892). This echoes James Wilson's reasoning during the Convention's debate on this section:

"The people have a right to know what their agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings." J. Madison, Notes on debates in the Federal Convention of 1787, at 434 (Ohio Univ. Press, 1966).

In gauging the tenor of the times, it is significant that this section generated heated battles in the Ratification debates, and not because it stood for the principle of Congress' obligation to inform the public. Anti-federalists argued vehemently that the provision did not go far enough, inasmuch as it allowed the people's representatives to con-

duct secret proceedings "in their judgment."⁶⁵ They were assuaged only after Madison and other influential members of the Convention assured them that the secrecy provision would be invoked only on extremely rare occasions and that the people's representatives could be trusted to exercise considerable restraint in withholding any proceedings from the electorate.⁶⁶

Given their recognition of the obligation of congressmen to inform and enlighten the electorate; their conviction that communication between a representative and his constituents was the heart of a representative's functions; their knowledge of abuses by the Crown in stifling dissent in the legislature under the guise of punishing "sedition" and "treason"; their decision to require the publication of congressional proceedings; and their fundamental belief in separation of powers, it is manifest that the framers intended the publication of committee hearings by a congressman to be privileged. It is simply inconceivable that they could have intended to allow intrusions by the execu-

⁶⁵ See, for example, Patrick Henry's impassioned plea in the Virginia Ratification Convention:

"Give us at least a plausible apology why Congress should keep their proceedings in secret. . . . They may carry on the most wicked and pernicious of schemes under the dark veil of secrecy. The liberties of the people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them. The most iniquitous plots may be carried on against their liberty and happiness.

" . . . Under the abominable veil of political secrecy and contrivance, your most valuable rights may be sacrificed by a most corrupt faction, without you having the satisfaction of knowing who injured you We may labor under the magnitude of our miseries without knowing or being able to punish those who produced them." III Elliot's Debates 170, 315-316 (1788). Along the same vein, see III *id.*, at 376-378.

⁶⁶ See, e.g., in The Virginia Ratification Debates, III Elliot's Debates at 331-332 (Madison), 399-400 (Madison), 401 (Randolph), 408-409 (Madison), 459 (Mason), 460 (Madison and Mason).

tive or judiciary for any reason into the free communication of information about matters of public importance by a representative to the people. Jefferson's protest against such intrusions is the only position which is consistent with the basic theories of sovereignty, government and representation enunciated in the Constitution: For the Executive and grand jury "to interpose in the legislative department between the constituent and his representatives . . . to put the representative into jeopardy of criminal prosecution, of vexation, expense and punishment . . . if his communications, public or private, do not exactly square with their ideas of fact or right, or their designs of wrong, is to . . . leave us, indeed, the shadow, but to take away the substance of representation . . . rendering ineffectual that wise cautious distribution of powers made by the constitution between the three branches" ⁶⁷ They thus understood that restraints on the exercise of the informing function through the publication of committee reports must come from the House itself, which is given ample power in Article I, section 5 to discipline its members.

4. *The Matthew Lyon Case.*

Finally, this view of the framers of our Constitution with respect to the informing function aspect of the privilege was shared by those who counted the most—the people. The privilege of a Congressman to inform his constituents was so well recognized as an essential part of our polity that during the entire disgraceful period of enforcement of the Alien and Sedition Acts, when the Executive equated criticism of its foreign policy with giving aid and comfort to the enemies of the United States, only one prosecution of a congressman for publishing "seditious libels"

⁶⁷ Pretest, *supra*, pp. 55-58.

occurred. This was the trial of Congressman Matthew Lyon of Vermont in 1798. This trial, its effects on representative government, the intense public reaction to it, and Lyon's ultimate vindication bear witness to the disastrous consequences to separation of powers which result when the executive and judicial branches take action against a legislator who speaks out, in any form, against policies thought by the Executive, but not by the people's representatives in Congress, to be essential to the national security.

Lyon was tried under the Sedition Act for publishing two letters: the first accusing the President of an "unbounded thirst" for power, adulation and ridiculous pomp; and the second reprinting a communication from a French diplomat containing a charge of "stupidity" in our policy towards that country.⁶⁸

Lyon was then "an active opposition member of the House of Representatives, where the vote was so equally balanced as to make his withdrawal of national political consequence; and he was then a candidate for re-election."⁶⁹ Lyon offered no real defense, both he and the reporter attributing this to his ignorance of the law (his counsel, the Chief Justice of Vermont, had withdrawn because the Court refused to allow adequate time for preparation).⁷⁰ He was found guilty by a jury and sentenced by two federalist judges to four months imprisonment and a fine of \$1000. The Administration's careful planning was upset, however, when Lyon's constituents, enraged at the imprisonment of their representative for criticizing Adams,

⁶⁸ *Lyon's Case*, Case No. 8, 646, 15 Fed. Cas. 1183 (C.C.D. Vt. 1798). This case is also discussed in detail in J. M. Smith, *Freedom's Fetters*, *supra*, at 221-241 in a chapter aptly titled "The Ordeal of the Critical Congressman."

⁶⁹ 15 Fed. Cas. at 1187.

⁷⁰ *Id.*, at 1185, 1187.

formed a mob and threatened to free him forcibly from jail. Lyon apparently perceived the political leverage he now possessed and quieted the mob. His continued imprisonment was so embarrassing "[t]hat the cabinet panted for an excuse to liberate him."⁷¹ He was offered a pardon for an apology (the President said that "repentance must precede mercy") and, apparently, a money bribe; but Lyon held fast. He was re-elected while in jail by an overwhelming majority, returned to his seat, and continued his attacks on the Administration.⁷² A move by Administration forces in the House to expel him failed to get the necessary two-thirds. Lyon served another ten years in the House, and final vindication came in 1840 when an Act of Congress was passed by both Houses and signed by the President declaring his conviction void.⁷³

In repudiating the harassment and persecution of Congressman Lyon, Congress believed that it laid to rest forever the premises underlying the Sedition Act. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 274-276 (1964), this Court agreed, holding that these premises were inconsistent with the form of government established by the Constitution and "the attack upon [the Act's] validity has carried the day in the court of history." Just as the controversy over the Act "crystallized a national awareness of the central meaning of the First Amendment," *id.*, at 273, the *Cabell* and *Lyon* cases established the centrality of the informing function of Congress and the principles of separation of powers to the free speech privilege of the people's representatives. This broad consensus of opinion, articulated by Jefferson, Madison and Wilson and by the people themselves, ought now to be recognized as the proper mean-

⁷¹ *Id.*, at 1189.

⁷² *Id.*, at 1190.

⁷³ *Id.*, at 1190-1191.

ing of the Speech or Debate Clause, so that the Sedition Act's "last vestige [is] effaced, and its doctrines finally disowned."⁷⁴

D. ENGLISH HISTORY AND DECISIONS SUSTAIN THAT PUBLICATION OF LEGISLATIVE PROCEEDINGS IS GUARANTEED BY THE PRIVILEGE.

1. *The Purpose of the English Bill of Rights—the Case of Rex v. Williams.*

The Speech or Debate Clause is the product of a lineage of legislative free speech guarantees from the English Bill of Rights of 1689 to the first state constitutions and the Articles of Confederation. *See generally Tenney v. Brandhove, supra*, at 372-375. Historians are unanimous in concluding that the *legislative free speech guarantee in the English Bill of Rights resulted from a prosecution of a member of the House for causing to be published and disseminating to the people a committee report and was specifically designed to protect such conduct in the future.*⁷⁵ This case, the prosecution of Sir William Williams, Speaker of the House is of overriding importance since it was "one of the immediate causes of the Revolution . . . (and) the occasion of one of the most important clauses in the Bill of Rights, and probably therefore of the like provision in the Constitution of the United States." *McIlwain, supra*, at 242.

The grievance which gave rise to the legislative free speech provision is set forth clearly in the preamble to the Bill of Rights:

⁷⁴ 15 Fed. Cas. at 1191.

⁷⁵ See, e.g., *McIlwain, supra*, at 42-44; *Wittke, supra*, at 110-112; W. C. Townsend, *History of the House of Commons*, 412-416 (1843); Report of House Committee on the Privileges of Parliament (1771), reprinted in 8 S.T. 16-17.

"Whereas the late King James the Second, by the assistance of diverse evill councillors, judges and ministers, imployed by him did endeavor to subvert and exterpate the Protestant religion, and the lawes and liberties of this Kingdome . . . by prosecutions in the Court of King's Bench for matters and causes cognizable onely in Parlyment . . . The said lords spirituall and temporall and commons . . . for the vindicating and asserting their annient rights and liberties, declare . . ."

Corresponding to this article of grievance was the declaration:

"That the Freedom of Speech, and Debates or Proceedings in Parlyment, ought not to be impeached or questioned in any Court or Place out of Parlyment."

1 W. & M., Sess. 2, c. 2

This provision was not by its terms confined to spoken words and could not have been so intended. The last prosecution of members for words spoken in Parliament had occurred in Eliot's case in 1629 during the reign of Charles I, and that conviction was reversed on writ of error by the House of Lords in 1668.⁷⁶ The *only* prosecution of a member by King James II was that of Sir William Williams in 1686-1688 for having ordered the publication of a House committee report which alleged misconduct by the king, his family and advisors.⁷⁷

⁷⁶ See pp. 27-29, *supra*; Wittke, *supra*, at 103-106.

⁷⁷ See Report of the House Committee on the Privileges of Parliament (1771), reprinted in 8 S.T. 16-17:

"This proceeding the Convention Parliament deemed so great a grievance, and so high an infringement of the rights of Parliament, that it appears to your Committee to be the principal, if not the sole object of the first part of the eighth

The great case of Sir William Williams began during the reign of Charles II, where the House of Commons, of which Williams was Speaker, received a number of narrative reports about an alleged popish plot between the king, his relatives and advisors and the King of France to restore Catholicism as the established religion and to violate the free exercise of religion by Protestants.⁷⁸ The most famous of these narratives was Dangerfield's Narrative, which contained allegations of this sort in lurid detail against some of the most prominent members of the court. A committee of the House received this narrative, their report containing it was entered on the Commons Journal, and the House then gave permission to several of its members and outside printers to publish the narrative and other papers relating to the popish plot.⁷⁹ Williams, the Speaker, requested and received permission to publish Dangerfield's Narrative.⁸⁰ Sir William Courtney, among others, went on record for the reason for the printing.⁸¹

head of the means used by King James to subvert the laws and liberties of this Kingdom, as set forth in the Declaration of the Two Houses"

⁷⁸ See generally, J. Pollock, *The Popish Plot; A Study in the History of the Reign of Charles II* (1944).

⁷⁹ See 9 C.J. 630-695. On November 15, 1680, permission was given to Mr. Dugdale; on November 19, to a nonmember, Signior Francisco de Ferra; and on December 23, to Mr. Dennis. See also 9 C.J. 670, for the order permitting other papers about the Popish Plot to be published. The printing continued through 1681 as new information was received. See 9 C.J. 709, 711.

⁸⁰ 9 C.J. 649.

⁸¹ II J. Torbuck, *A Collection of the Parliamentary Debates in England* 96 (1741). (Courtney's statement was made on March 24, 1681.) Another member said, less ominously:-

"The Privy Council is constituted by the King, but the House of Commons is by the choice of the people. I think it not natural nor rational, that the people who sent us hither should not be informed of our actions." *Id.*, at 92.

"Let men know what they please, the weight of England is the people; and the more they know, the heavier will it be; and I could wish some would be so wise as to consider, that this weight hath sunk ill ministers of state, almost in all ages; and I do not in the least doubt, but it will do so to those who are the enemies of our religion and liberties."

A number of seditious libel prosecutions were instituted by Charles II against the authors of virulently anti-Catholic narratives.⁸² All were found guilty by the hand-picked judges of the King's Bench.⁸³ Yet even Charles II dared not attack members of Parliament. This rash action was undertaken in 1686, the year James II succeeded to a turbulent throne, with the filing of an information in the King's Bench against Sir William Williams for the publication of Dangerfield's Narrative.⁸⁴

Williams was represented by Sir Robert Atkins, a former Chancellor of the Exchequer, who came out of retirement to argue on behalf of the free speech privilege of the House.⁸⁵ Atkins' argument contained a remarkable

⁸² The earlier cases included the Trial of William Staley, 6 S.T. 1501 (1678); Trial of Edward Coleman, 7 S.T. 1 (1678); Trial of Ireland, Pickering and Grove, 7 S.T. 79 (1678); Trial of Green, Berry and Hill, 7 S.T. 159 (1679); Trial of Whitehead, Harcourt, Fenwick, Gowen and Turner, 7 S.T. 311 (1679); Trial of Langhorn, 7 S.T. 418 (1679).

⁸³ See VI Holdsworth, *A History of English Law* 502 *et seq.* (1924); J. Pollock, *supra*, at 266-287.

⁸⁴ Proceedings Against Sir William Williams, 13 How. St. Tr. 1370 (1686-1688).

⁸⁵ Atkins had been dismissed from the bench for contradicting a dictum of Chief Justice Scroggs that the presentation of a petition for the summoning of Parliament was high treason. For in the life-and-death struggles of the King and his ministers against those who opposed despotism, state trials were not impartial inquiries; the task of the judge was to defend the King's case and

exposition of the origin, development and purposes of the privilege. He traced the history of the privilege from its early judicial antecedents, which he claimed settled the principle that anything said or done in Parliament could not be questioned in any inferior court.⁸⁶ He then argued, on functional terms and with an amazingly modern ring, that the privilege encompassed actions of members in effectuating the powers of Parliament. He saw those powers as three-fold: a legislative power, in the enactment of statutes; a judicial power, when acting as the High Court; and a counselling, or enquiring, power.⁸⁷ As evidence of the latter he cited the obligation of the House to investigate matters of state, expose corruption and maladministration, punish offending ministers and offer guidance to the king.⁸⁸

Atkyns tied Williams' printing of the report to the enquiring function. He asserted, in fact, that this function

if he went astray, as did Atkyns, the penalty was dismissal. J. Pollock, *supra*, at 282-287. "It is due to their connection with these trials that posterity has branded the names of three judges (Jeffries, Pemberton and Scroggs) with lasting infamy." *Id.*, at 265. Two of these judges—Jeffries and Pemberton—sat on the court that tried and convicted Sir William Williams. Townsend, *supra*, at 413.

⁸⁶ *Id.*, at 1383-1407.

⁸⁷ *Id.*, at 1410-1413.

⁸⁸ "I might enumerate a vast multitude of Animalia Majora, no small flies, that have in several ages been caught in the net or web of an inquiry made by the House of Commons, who fish only for such greater fish, such as we call the pike, who by oppression live upon the smaller fish, and devour them. The Commons to that end fish with a net, that has a wide and large mesh, such as lets go the small fry, and encompasses none but those of the largest size." *Id.*, at 1413. "The plea shows; that one great lord was convicted . . . by impeachment of the Commons, and attainted before the Lords. The King's speech shows that there was need of further enquiry, and that it was not as yet thoroughly done, nor himself, nor the two Houses safe . . ." *Id.*, at 1414.

was necessary for the accomplishment of all of the House's powers:⁸⁹

"... [T]he enquiry is the most proper business of the House of commons. For this reason they are commonly styled The Grand Inquest of the nation...."

"This enquiry of theirs is necessary in a subserviency of all the several high powers of that high court. Namely, in order to their legislature, or to the exercise of their power of judicature....

"Or it may be in order to their counselling power, for removal of great officers or favorites....

"But still they must first make enquiries... [and] the most effectual enquiry is most probably from without doors; and without such enquiry, things of great importance may lie concealed."

Atkins then responded to the Attorney General's contention that the act of publication divested Williams of the privilege. As a matter of common sense, he said, this was absurd. The narrative had already been made public when read before the bars of both Houses and entered in their Journals; the publishing in print changed nothing.⁹⁰ Finally, Atkins asked rhetorically, "but what need was there of printing it?" and responded that the House "out of a sense of duty" might decide that it was necessary to inform and alert the public of Dangerfield's charges against high ministers. An enlightened public might then offer more information, "a fuller proof," that could lead to the prosecution, removal, or clearing of the ministers.⁹¹ Publication of the report was a good way of conducting this further enquiry; "of late years enquiry by printing has

⁸⁹ *Id.*, at 1414-1415.

⁹⁰ *Id.*, at 1415-1417.

⁹¹ *Id.*, at 1417-1418.

been a most frequent practice, and we meet with it every week, and it is become the most ordinary way of making enquiries, which run into all parts of the nation."⁹²

Atkyns' argument was thus a forerunner of the standard applied two hundred years later by this Court—that the privilege protects things "generally done" by members "in relation to the business" before the legislature.⁹³ In ordinary times, this argument would have been successful; but James II dismissed the honest judges of the King's Bench and caused Williams to be tried by a court headed by the notorious Jeffries.⁹⁴ The plea of privilege was rejected out of hand and Williams was fined ten thousand pounds.⁹⁵

James II was sent into exile shortly after Williams' conviction, and a committee was appointed by the House of Commons "to bring in general Heads of such things as are absolutely necessary to be considered for the better securing our Religion, Laws, and Liberties." The committee was chaired by Sir George Treby and contained Sir Wil-

⁹² *Id.*, at 1418.

⁹³ *Kilbourn v. Thompson*, *supra*, at 204.

⁹⁴ Townsend, *supra*, at 413. Jeffries earned the nickname "The hanging judge" when he was dispatched by James II to try participants in the unsuccessful Scot revolt; James II is said to have commented that there was no doubt as to the outcome: "Jeffries will try them and they shall surely hang." See also fn. 85, *supra*.

⁹⁵ See *Rex v. Williams*, 2 Show. K. B. 471, Com. 18, 89 Eng. Rep. 1048:

"[Williams' counsel] began, 'The Court of Parliament . . .'

"Lord Chief Justice [interrupting]: 'Court, do you call it? Can the order of the House of Commons justify the scandalous, infamous flagitious libel? . . . Let judgment enter for the King.'"

Williams paid 8,000 pounds, and the King acknowledged satisfaction. No better case of "intimidation by the executive and accountability before a possibly hostile judiciary," *United States v. Johnson*, *supra*, at 181, is found in the reports.

liam Williams.⁹⁶ The committee reported back, and Treby said of the free speech guarantee:⁹⁷

“This Article was put in for the sake of one, once in your place (i.e., the Speaker), Sir William Williams, who was punished out of Parliament for what he had done in Parliament.”

A delegation was then sent to the House of Lords, with Williams at its head, and in February of 1689 the two Houses agreed upon the broad language of the Bill of Rights.⁹⁸ In July, the House of Commons passed a specific resolution that the judgment of the King's Bench against Williams “is an illegal Judgment, and against the Freedoms of Parliament.”⁹⁹

This history should lay to rest any contention that the publication and dissemination of legislative proceedings is

⁹⁶ 10 C.J. 15 (January 29, 1689).

⁹⁷ 9 Grey's Debates 81, reprinted in Report from the Select Committee on the Official Secrets Act 24 (House of Commons, 1939).

⁹⁸ 10 C.J. 21 *et seq.*

⁹⁹ 10 C.J. 215. A bill to reverse the conviction and compensate Williams for the fine was sent to the House of Lords. The Lords did not act favorably upon it because that would have required payment to Williams of the not insubstantial amount of 8000 pounds from a greatly depleted treasury. There was “no disposition to make pecuniary compensation to any of those who had suffered illegally during James' reign, unless a source independent of the public purse could be found for that purpose.” Townsend, *supra*, at 415. See also 13 How. St. Tr. at 1438-1439. Consideration was given to confiscating the estates of Jeffries and Sir Robert Sawyer, who had filed the information against Williams; but the Lords declined to do so in 1695. On that occasion, Williams spoke eloquently:

“I value much more your rights and my own honor, than I do my estate It is my glory that I have left a record for the rights and freedom of Parliament. In this proceeding posterity will justify me.” 13 How. St. Tr. at 1440.

not protected legislative activity. On the contrary, it is fair to conclude that the free speech guarantees beginning with the English Bill of Rights were designed to protect just such activity.

2. *Subsequent-Decisions Holding the Privilege Applicable to Members who Publish Without Permission of the House.*

The English Bill of Rights of 1689 overruled the King's Bench decision in the *Williams* case and established that publication of proceedings was encompassed within the free speech privilege. Williams had, however, obtained an order from the House to publish Dangerfield's Narrative. It would seem to be a short step from that to the protection of publication by a member on his own.¹⁰⁰ Yet that step was taken only after a prolonged conflict with the courts between 1795 and 1868. Care must be taken in analogizing the English cases—all decided after the Constitution was written—to the scope of the privilege in America because of the existence of certain historic factors in England which were there relevant in molding the privilege in this area but which have never existed in our country. The major factor is the standing rule of the House of Commons, dating back to the early 1600's, which prohibited the publication of its proceedings, either by members or by the press, except by specific leave of the House.¹⁰¹ This rule was justified first to insure secrecy against Stuart and Tudor monarchs who systematically threatened retaliation against members who were discovered to have intruded into their prerogatives in parliamentary debates, but the rule was later invoked out of fear of misrepresentation in

¹⁰⁰ After all, the order of only one House does not constitute law.

¹⁰¹ See II T. E. May, *Constitutional History of England* 34 (10th ed. 1891).

the press and a general intolerance to public opinion.¹⁰² When individual members and the House printers then claimed the right to publish the proceedings, their arguments about the necessity to enlighten the public were greeted quite unsympathetically by courts which had observed the imprisonment of newspapermen by the House for the violation of the standing rule.¹⁰³ These circumstances, of course, did not exist in America, where Congress was *required* by the Constitution to publish its proceedings and where Congress from its earliest days recognized its obligation to make its proceedings widely available to the public and encouraged individual members to do so.¹⁰⁴

¹⁰² See T. E. May, *Parliamentary Practice* 53 (15th ed. 1950); Parry, *Legislatures and Secrecy*, 67 *Harv. L. Rev.* 737, 742 (1954).

¹⁰³ See II T. E. May, *Constitutional History of England* 33-49 (10th ed. 1891).

¹⁰⁴ This argument was made by several constitutional law experts in Congress during the debates in Sam Houston's case in 1832. A Congressional opponent of Houston had attacked him in a speech on the floor and then had the speech reprinted in a Texas newspaper. Houston later assaulted violently this congressman on a Washington street, for which he was tried for contempt of Congress. One of Houston's defenses was that he had not committed a breach of the free speech privilege because the assault was motivated by the publication and not the speech. Although this defense was rejected on the facts, it did set off a marathon debate on the scope of the speech and debate privilege. The virtually unanimous view of the House was that publication of speeches and reports was encompassed within the privilege. Representatives stressed the functional nature of the Speech or Debate Clause as protecting all the necessary and customary duties of office. They viewed the informing function as just such a duty implicit in our system of representative government. And they distinguished English cases as resting on the standing rule of the House of Commons which prohibited publication. See especially Gales & Seaton's Register 2840-2852 (May 8, 1832) (Mr. Ellsworth); 2871-2884 (May 9, 1832) (Mr. Doddridge); 2930-2968 (May 10, 1832) (Mr. Crane) 2970-2971 (May 10, 1832) (Mr. Burges); 2983-2984 (May 11, 1832) (Mr. Archer); 2989-3002 (May 11, 1832) (Mr. Kerr).

An examination of these post-Constitution English cases is nevertheless instructive because the privilege was ultimately extended to publication of legislative proceedings due to the recognition of the informing function of Parliament. In England, members of Parliament are now privileged in publishing speeches and reports for the information of their constituents, and this privilege applies derivatively to publishers and to the press. The first cases which held to the contrary, and which were relied upon by the Court of Appeals,¹⁰⁵ were never firmly settled and have not survived. The evolution of English decisions is as follows:

(a) In *Rex v. Lord Abington*, 1 Esp. 226, 170 Eng. Rep. 337 (1795), a member of the House of Lords accused his attorney of unprofessional conduct, in a speech on the floor. Abington later arranged for the speech to be published, and the attorney instituted a libel action. Although Abington pled the privilege as a bar to the action, he did not argue that the privilege was applicable due to his obligation to inform his constituents; nor could he have so argued since he was a member of the House of Lords, and thus not elected to Parliament. Lord Kenyon sitting *nisi prius*, rejected the plea. His opinion is quite clear in upholding the right to publish speeches made in Parliament, but he excluded from that right libels against *private individuals*:

"A Member of Parliament has certainly the right to publish his speech, but that speech should not be made a vehicle of slander against any *individual*; if it was, it was a libel." *Id.*, 170 Eng. Rep. at 340. (Emphasis added.)

(b) Four years later, in *Rex v. Wright*, 8 T.R. 293, 101 Eng. Rep. 1396 (1799), the King's Bench held a bookseller

¹⁰⁵ P.W.C. 9a.

absolutely immune for printing and circulating an allegedly libellous House report. The Crown relied principally upon the trial of Sir William Williams as *authority* for this prosecution; but Lord Kenyon, now Chief Justice, dismissed the argument with the comment that that case "happened in the worst of times." Justice Grose, more forthrightly, said of the *Williams* case, "it must be remembered that that was declared by a great authority to be a disgrace to the country." And Lord Kenyon stated the broad principle:

"[T]he report in question, being adopted by the House at large, is a proceeding of those who, by the constitution, are the guardians of the liberties of the subject; and we cannot say that any part of that proceeding is a libel." *Id.*, 101 Eng. Rep. at 1398.

The third member of the Court, Justice Lawrence, concurred on the basis of the public's right to be informed fully about proceedings in Parliament:

"... It is of advantage to the public, and even to legislative bodies, that true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller." *Id.*, 101 Eng. Rep. at 1399.

(c) Obviously, there was a basic inconsistency in the approach taken by the court, including Lord Kenyon, in *Wright* as contrasted to *Abington*. Unfortunately, by the time that *Rex v. Creevey*, 1 M. & S. 272, 105 Eng. Rep. 102 (1813), a libel action for publication against a member of the House, was decided, Lord Kenyon had died and his successors had to reconcile the precedents. Instead, they

held that the privilege did not extend at all to a publication of a speech—a position hardly supported even by the narrow holding of *Abington*—the theory being that since the House has a standing order against publication of its proceedings, any member who does so is acting *ultra vires*. See *Wason v. Walter*, discussed in (e), *infra*.

(d) In *Davison v. Duncan*, 7 E. & B. 229, 233, 119 Eng. Rep. 1233, 1234 (1857), all of the justices agreed in dictum, that despite *Creevey* a member of Parliament was privileged in republishing a speech in order to disseminate it to his constituents.

(e) In *Wason v. Walter*, L.R. 4 Q.B. 73 (1868), the Court held, in a libel action against a bookseller for publication of a speech in Parliament that the privilege protected a member, if published "for the information of his constituents," *id.*, at 95, and afforded derivative protection to a publisher.

The governing principle was that the informing function of Parliament was essential to representative government:

"... How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? ... can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large? ... It seems to us impossible to doubt that it is of paramount public and national im-

portance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls; seeing that on what is there said and done, the welfare of the community depends." *Id.*, at 89.

The court then severely criticized the reasoning of earlier cases, including *Stockdale v. Hansard*, 9 A. & E. 2, 112 Eng. Rep. 1112 (1839), and *Abington and Creevey* were limited in the narrowest possible manner. Finally, the Court forthrightly rejected the *ultra vires* argument:

"It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both houses of parliament [P]ractically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them Collectively, as well as individually, the members of both houses would deplore as a national misfortune the withholding their debates from the country at large The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; *it is essential to the working of our parliamentary system, and to the welfare of the nation.* Any argument founded on its alleged illegality appears to us, therefore, entirely to fail." L.R. 4 Q.B. at 95. (Emphasis added.)

(f) *Wason v. Walter*, *supra*, was the last judicial decision in England considering the privilege in the context of publishing proceedings. In 1938, however, the House of Commons appointed a select committee to consider the applicability of the Official Secrets Act to members of Parliament. The incident precipitating the appointment of the committee was the action of a military court of inquiry in subpoenaing a member of the House of Commons, Duncan Sandys, who obtained and disclosed highly sensitive military documents, containing current battle of order plans and marked "secret," allegedly in violation of the Official Secrets Act. The committee asked Sir Gilbert Campion, a noted scholar and legal advisor to the House, to prepare a memorandum on the law of privilege in England. He concluded, among other things, that a member was immune from judicial proceedings and all forms of executive and judicial harassment for receiving documents in violation of the Act and in disclosing them on the floor or in committee. Report from the Select Committee on the Official Secrets Act 23-28 (1939). He then reviewed the libel cases from *Abington* through *Wason v. Walter* and concluded that the privilege would include as well the publication and dissemination to the public of such a speech or hearing, at which he disclosed classified information:

"If . . . a member circulated among his constituents a speech made by him in Parliament in which he had disclosed information of the kind in question, it might be held on the analogy of the principles which have been said to apply to prosecutions for libel that he could not be proceeded against for disclosing it to his constituents, unless, of course, the speech had been made in secret session. Even if the suggested analogy is not admitted, it would be repugnant to common sense to hold that though the original disclosure in the House

was protected by parliamentary privilege, the circulation of speech among the member's constituents was not." *Id.*, at 29.

In America, Congress has never had standing orders against publication; from the beginning, Congress has actually encouraged it. See, *e.g.*, 39 U.S.C. § 4163 (the franking privilege). Indeed, such a rule would appear to be specifically prohibited by Article I, section 5. And the legislative privilege for publication was recognized fully in England only after democratic reforms had emphasized the primacy of Parliament as the people's representatives, and the correlative informing duty. Again, in America, this was the revolutionary presupposition of our Constitution.

Over one hundred years ago, the British recognized that parliamentary privilege, for both members and those acting on their behalf, must extend to the publication of parliamentary papers in order to ensure the public that legislators will perform their vital informing function. There is no reason in history or policy why the rights of the people's elected representatives should be narrower in the United States. In fact, it would be anomalous in the extreme for Great Britain, a country in which separation of powers is *not* a constitutional principle of government, to have definitively established this privilege, but for the United States, where separation of powers has been a basic doctrine from the outset, to reject it.

E. THE PRIVILEGE IS NOT DIVESTED BECAUSE THE LEGISLATIVE ACTIVITY IN QUESTION WAS CARRIED OUT IN A MANNER DEEMED BY A FEDERAL COURT TO BE IRREGULAR AND CONTRARY TO THE COURT'S NOTION OF GERMANENESS.

Perhaps out of recognition that its holding was at odds with the thrust of prior decisions of this Court and

was inconsistent as well with the history and policies underlying the Speech or Debate Clause, the Court of Appeals suggested that ordinary publication of committee reports might well be constitutionally protected but that this particular instance was not. This was implied in the initial decision¹⁰⁶ and stated beyond doubt in the second opinion, (on rehearing), where the Court of Appeals "dr[ew] a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of, we must presently assume, lawfully classified documents, through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern." (P.W.C. 2c.)

The clarifying language in the opinion on rehearing indicates clearly that the Court of Appeals has thus taken upon itself the power of determining whether or not a procedure followed by a senator in the performance of his legislative functions is sufficiently "regular" so as not to divest his protection under the Speech or Debate Clause. In so doing the Court of Appeals has departed drastically from settled principles. Even the District Court recognized in its opinion that "[t]he courts have no right to dictate . . . the procedures for Congress to follow in performing its functions. . . ." and that "[j]udging the applicability of the legislative privilege in the exercise of the functions of a legislator's office should be done 'without inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules,' " 332 F. Supp. at 936. See also, *e.g.*, *Tenney v. Brandhove*, *supra*; *Coffin v. Coffin*, *supra*; and *Cochran v. Couzens*, 42 F. 2d 783 (D.C. Cir. 1930).

¹⁰⁶ "We will not hold that there is a constitutional privilege to print privately what, we must assume for present purposes, were classified documents simply because intervenor (Senator Gravel) had first disclosed them to a Senate subcommittee whose function was totally unrelated thereto." (P.W.C. 10a.)

Article I, section 5 of the Constitution vests in Congress, and Congress alone, the power to make and enforce rules for its proceedings. This is a "textually demonstrable commitment" of authority to a coordinate branch of government, cf. *Baker v. Carr*, 369 U.S. 186 (1961), and clearly precludes superintendence by the judicial branch. How a House of Congress internally allocates its functions among its committees is a political question which is beyond the cognizance of the courts.¹⁰⁷ The judiciary has no more authority to tell a senator what is "germane" to the subcommittee which he chairs¹⁰⁸ than to adjudicate the current jurisdictional dispute between the Foreign Affairs and Armed Services Committees. The privilege is inapplicable to committee investigations only when it is "obvious that there was a usurpation of functions exclusively vested in the Judiciary or in the Executive." *Tenney v. Brandhove*, *supra*, at 378. As the District Court observed, a committee investigation into the causes and conduct of the war in

¹⁰⁷ Of course, as with other variants of the political question doctrine, when a committee infringes upon an individual's constitutional rights, the courts may be obliged to examine enabling legislation in order to determine whether there is an overriding governmental interest. *E.G.*, *Watkins v. United States*, 354 U.S. 178, 205 (1957). Here, no such claim is made by the Government, and the matter is "peculiarly within the realm of the legislature." *Ibid.* See also *Yellin v. United States*, 374 U.S. 109, 121-122 (1963), which drew this distinction precisely.

¹⁰⁸ Moreover, even if somehow the Court of Appeals possessed the constitutional power to substitute its judgment for Senator Gravel's or what is relevant to the subcommittee, its conclusion that the documents in question are not, is a mere *ipse dixit*. The Court of Appeals did not even examine the enabling rules of the subcommittee; nor did it investigate past practices; nor did it consider the impact of the fact that there is no germaneness rule in the Senate; nor did it answer Senator Gravel's point that the war in Vietnam was relevant to the business of many subcommittees, including his own, because of its effects on the availability of funds for domestic programs.

Vietnam is hardly such a "usurpation," 332 F. Supp. at 935.¹⁰⁹

It is equally clear that there is nothing in the nature of "private" publication which may defeat the privilege. Technological developments in printing have so persuaded congressmen and other public officials to utilize private facilities to disseminate reports and records in order to obtain the cheapest and most widespread distribution that it is now a dominate mode of publication. This Court may take judicial notice of the fact that, for example, every important commission report over the last decade has been printed privately.¹¹⁰ Similarly, transcripts of many signif-

¹⁰⁹ The Court in *Kilbourn v. Thompson*, *supra*, at 205, cited the kind of "usurpation" of authority which would fall outside of the privilege:

"If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act so as to imitate the Long Parliament in the execution of the Chief Magistrate of the Nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate."

¹¹⁰ See *Violence in America, Historical & Comparative Perspectives* (Graham and Gurr et als., Task Force on Historical & Comparative Perspectives, Report to the National Commission on the Causes and Prevention of Violence) (1969); *To Establish Justice, To Insure Domestic Tranquility* (National Commission on the Causes and Prevention of Violence, introd. by Reston) (1970) ("Eisenhower Commission Report") (1969); *The Challenge of Crime in a Free Society* (President's Commission on Law Enforcement and Administration of Justice, introd. by Silver) (1968); *Rights in Conflict: The Violent Confrontation of Demonstrators and Police in the Parks & Streets of Chicago During the Week of the Democratic Convention of 1968* (Report to the National Commission on the Causes and Prevention of Violence, introd. by Max Frankel) (1968) ("The Walker Report") (1968); Report by the U.S. National Advisory Commission on Civil Disorders (1968) ("The Kerner Commission Report"); Report of the Commission on Obscenity and Pornography (1970).

icant congressional committee hearings have been printed privately and published in book form. Some of the better known examples are the 1966 Senate Committee Hearings on the Vietnam War,¹¹¹ the 1954-1955 Subcommittee Hearings on Juvenile Delinquency,¹¹² the 1961 Subcommittee Hearings on Employment, Manpower and Poverty,¹¹³ the Hearings on the Housing Act of 1936,¹¹⁴ the 1937 Hearings on the Reorganization of the Federal Judiciary,¹¹⁵ the 1902 Hearings on the Philippine Insurrection,¹¹⁶ the 1867 House Hearings on the New Orleans race riots,¹¹⁷ the 1866 Hearings on the Memphis riots,¹¹⁸ and the 1866-1868 Report of the Joint Committee on Reconstruction.¹¹⁹ And even before

¹¹¹ The Vietnam Hearings (copyright and intro. by J. W. Fulbright) (1966); The Truth About Vietnam: Report on the U. S. Senate Hearings (analysis by Wayne Morse, intro. by J. W. Fulbright) (1966); U. S. Policy Toward China: Testimony Taken from the Senate Foreign Relations Hearings (1966).

¹¹² Juvenile Delinquency (Youth Employment) (1968); Juvenile Delinquency: National, Federal and Youth Serving Agencies (1968); Juvenile Delinquency: Comic Books, Motion Pictures, Obscene and Pornographic Materials, Television Programs (1969); Juvenile Delinquency: Treatment and Rehabilitation of Juvenile Drug Addicts (1969).

¹¹³ The Manpower Revolution: Its Policy Consequences (1965).

¹¹⁴ Summary of Hearings on the Wagner Housing Bill (National Association of Housing Officials 1936).

¹¹⁵ Reorganization of the Federal Judiciary (1970).

¹¹⁶ American Imperialism and the Philippine Insurrection (1969).

¹¹⁷ New Orleans Riots of July 30, 1866 (1969).

¹¹⁸ Memphis Riots and Massacres, 1866 (1969); Memphis Riots and Massacres (1969); Background for Radical Reconstruction (1970).

¹¹⁹ Report of the Joint Committee on Reconstruction (1971).

Other privately published congressional committee reports, listing of which is found in, among others, the Library of Congress card catalogue, include: The Jewish National Home in Palestine (House Committee on Foreign Affairs). (Hearings, 1970); The

this development became so pronounced, the public print-

Computer and Invasion of Privacy (House Committee on Government Operations Subcommittee) (Hearings, 1967); China, Vietnam and the United States (Senate Committee on Foreign Relations) (Hearings, 1966); The Ku-Klux Klan (House Committee on Rules) (Hearings, 1969) (reprint of the first publication of 1921); Invasion at Harper's Ferry (Senate Select Committee on the Harper's Ferry Invasion) (1969); Abridgement of the Debates of Congress, from 1789 to 1865 (1857-1861) (work then in progress); Affairs in the Late Insurrectionary States (Joint Select Committee on the Condition of Affairs in the Late Insurrectionary States) (1969); American Foreign Policy: Basic Documents, 1941-1949 (Prepared at the request of the Senate Committee on Foreign Relations by the staff of the Committee and the Department of State) (1971); Report of the Joint Committee on the Investigation of the Pearl Harbor Attack (Joint Committee on the Investigation of the Pearl Harbor Attack) (1972); The Journal of the Joint Committee of Fifteen on Reconstruction (B. B. Kendrick) (1969); Urban Crisis in America: The Remarkable Ribicoff Hearings (C. O. Jones and L. D. Hoppe, eds.); Reports on Crime Investigations (Senate Special Committee to Investigate Organized Crime in Interstate Commerce) (1969); Third Interim Report (Senate Special Committee to Investigate Organized Crime in Interstate Commerce) (1951); American Indians: Facts and Future, Toward an Economic Development for Native American Communities (Joint Economic Committee) (1970); National Priorities: Military, Economic, and Social (Joint Economic Committee, Subcommittee on Economy in Government) (1969); Soviet Economic Growth: A Comparison with the United States—A Study Prepared for the Subcommittee on Foreign Economic Policy of the Joint Economic Committee (Library of Congress, Legislative Reference Service) (1968); An Economic Profile of Mainland China (Select papers contributed by invited specialists for the study which was undertaken by the Joint Economic Committee) (forward by William Proxmire) (1968); Comparisons of the United States and Soviet Economies (Joint Economic Committee) (1968); Investigations of Senators Joseph R. McCarthy and William Benton, Report of the Subcommittee on Privileges and Elections to the Committee on Rules and Administration (Senate Committee on Rules and Administration) (1953); Enough Rope: The Inside Story of the Censure of Senator Joe McCarthy by his Colleagues—the Controversial Hearings that Signaled the End of a Turbulent Career and a Fearsome Era in American Public

er, who is after all distinguished only by being subsidized by the taxpayer, has not had a status at all different, under either American or English Law, from private printers who publish legislative proceedings.¹²⁰

Life (Senate Select Committee to Study Censure Charges) (1969); A Second Federalist—Congress Creates a Government (Selected from the Annals of Congress by Charles S. Hyneman and George W. Carey) (1967); Communism, Its Plans and Tactics (House Committee on Foreign Affairs) (by Frances P. Bolton, chairman, and other Members of Congress) (1949); Hearings on the Permanent Court of International Justice Before a Subcommittee of the Committee on Foreign Relations (Committee on Foreign Relations) (1924); Investigation of Administration of Louis F. Post, Assistant Secretary of Labor, in the Matter of Deportation of Aliens (House Committee on Rules) (1971); How Bull Run Battle Was Lost—The Ball's Bluff Massacre (Joint Committee on the Conduct of the War) (1863); The Secretary of State and the Ambassador—Jackson Subcommittee Papers on the Conduct of American Foreign Policy (Senate Committee on Government Operations) (1964); Rebel Barbarities—Official Accounts of the Cruelties Inflicted Upon Union Prisoners and Refugees at Fort Pillow, Libby Prison, Etc. (Joint Committee on the Conduct of the War) (1864); Army of the Potomac—History of Its Campaigns, the Peninsula, Maryland, Fredericksburg (Testimony of three commanders; Joint Committee on the Conduct of the War) (1863).

¹²⁰ See *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180 (D. D.C. 1970). 1 The Parliamentary Papers Act, §§ I and II (3 & 4 Vict., c. 9 (1840)); *Wason v. Walter*, 4 Q.B. 73 (1868). It should be noted that in this case Beacon Press made its paperback edition available to the public in sufficient quantity at a price of \$20 for the set, while the Government Printing Office made available a limited printing of a censored edition, with unnumbered pages (making the work less useful as a research and reference tool) at a price of \$50. Similarly, private publications of other important commission reports and congressional hearings have sold much more than the editions published by the Government Printing Office. For example, we have been advised by the Library of Congress that the Bantam edition of the Kerner Commission report had sales of 1,895,000, as compared to 62,500 for the G.P.O. edition (the latter costing almost three times the former); the Bantam edition of the Lockhart Commission Report was 250,000 and the

As this Court has recognized, the privilege would be "of little value" if it turned upon such amorphous concepts as "germaneness" and "regularity," for such standards in reality reduce to the way in which a judge or jury, in its discretion, speculates about the propriety of a congressman's actions. *Tenney v. Brandhove*, *supra*, at 377. The doctrine announced by the Court of Appeals, for the first time in our jurisprudence, would permit private suits against congressmen for speaking to their colleagues and to the electorate—which should be dismissed summarily—to go to the trier of fact upon a simple allegation of irrelevance or irregularity. *But see, e.g., Cochran v. Gouzens*, *supra*. It would permit the institution of grand jury proceedings and criminal prosecutions against disfavored legislators upon the same naked assertion. The "absolute" protection¹²¹ of the Speech or Debate Clause would crumble, and the "practical security" it seeks to afford rendered illusory, in the face of essentially political questions of regularity and propriety. This is precisely such a case. The executive branch believed that it would be improper to reveal to the public the contents of the Pentagon Papers; a United States senator, elected by the people, believed that it would be improper for those documents to be withheld from public scrutiny and that he had the duty to inform the people of their contents. The executive branch now

G.P.O. only 10,000 (with a similar price differential); and the combined sales of private editions of the 1966 Vietnam hearings totalled 42,000, compared to 6,023 for the G.P.O. edition.

¹²¹ The Speech or Debate Clause affords "an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session." *Barr v. Matteo*, *supra*, at 569. See also, *e.g., Powell v. McCormack*, *supra*, at 503; *Dombrowski v. Eastland*, *supra*, at 84-85; *Barsky v. United States*, 167 F. 2d 241, 250 (D.C. Cir.), cert. denied 334 U.S. 843 (1948); *Cochran v. Gouzens*, 42 F. 2d 783 (D.C. Cir.), cert. denied 282 U.S. 874 (1930).

asks the courts to umpire this dispute. "Courts are not the place for such controversies." *Tenney v. Brandhove, supra*, at 378. Neither are grand juries.

PART II.

The Speech or Debate Clause Prohibits Grand Jury Investigation into the Legislative Acts of a Senator through the Interrogation of Persons who Assisted Him in the Performance of his Duties.

In the preceding part, we have shown that the historical underpinnings of the Speech or Debate Clause, the purposes for its inclusion in the Constitution, and the specific intentions of the framers, all lead to the inescapable conclusion that the publication and circulation of the subcommittee record are privileged from judicial inquiry because they fall within the category of actions necessary to foster the aims of representative government and are customarily done by congressmen in relation to the business before the legislature. The protection given to acts such as these does not derive as an emolument of office but is essential to preserve the independence, integrity and freedom of the legislative branch and, hence, the rights of the people.

The executive branch in this case claims the right to intrude deeply into the legislative process by investigating, through the compulsory process and contempt powers of the grand jury and of the courts, the privileged legislative activities of Senator Gravel. It claims the right to subpoena everyone with whom the Senator dealt in the performance of his constitutional obligations and to interrogate them about how and why the Senator prepared for and conducted the subcommittee hearing and how and why he arranged for the publication and dissemination of the record of that hearing to his colleagues and to the electorate. The executive branch thus asks this Court to hold

that it may, in conjunction with the grand jury, intensively breach the sanctity of the legislative process. And, although given ample opportunity to do so in the lower courts, the Government has not even offered a reason, beyond the broadest of generalities, why this intrusion into the privileged activities of a coordinate branch would be even helpful, let alone necessary, in the enforcement of the criminal laws.

In evaluating whether this proposed investigation is barred by the protections of the Speech or Debate Clause, consideration must, of course, be given to the role which the Clause plays in our system of separation of powers and to its basic purpose of giving "practical security" to the legislature. *United States v. Johnson, supra*. Likewise, consideration must be given to the legitimate social interest in the enforcement of criminal and civil laws, save in those situations where constitutional mandate and overwhelming social policy dictate otherwise. *Ibid.*

A. AN INVESTIGATION BY THE EXECUTIVE BRANCH, IN CONJUNCTION WITH THE GRAND JURY, INTO THE LEGISLATIVE ACTS OF A SENATOR VIOLATES THE DOCTRINE OF SEPARATION OF POWERS.

As has been pointed out, *supra*, at pp. 5-10, the Justice Department in this case started out its intended investigation of the publication of the subcommittee record by focusing upon Senator Gravel personally. The lack of success of this focus in the courts below has forced the Justice Department to abandon any attempt to subpoena Senator Gravel in order to inquire into the details of his privileged conduct.¹²²

¹²² The Solicitor General stated in the petition for certiorari that there has never been any intention to call Senator Gravel as a witness before the grand jury (S.G.P. 15). The record makes clear

However, the Justice Department persists in continuing its investigation of the Senator's conduct in holding the hearing and publishing the record by seeking to interrogate parties whose aid was a *sine qua non* to the Senator's accomplishment of his legislative task, namely the Senator's aide and those who assisted him in publishing the record.

The argument made by the Senator herein is not that the introduction of the Pentagon Papers into the subcommittee's official record "bathes" all actors in the transaction with senatorial immunity in order to protect them or anyone. Rather, the Senator argues that on the facts of this case, in order for *the Senator* to be protected against unseemly and unconstitutional executive and judicial "question[ing] in any other Place" concerning his legislative acts, he must be able to assert his privilege against having those who assisted him in the accomplishment of his legislative obligations questioned about those very subjects on which the Government has now abandoned any efforts to question the Senator personally.¹²³ It is the Senator's own privilege, and more importantly the rights of the sovereign

that this simply is not so. Not only did the Justice Department claim the legal right to do so in both the District Court and the Court of Appeals, it also implied strongly that Senator Gravel would in fact be subpoenaed and could invoke his Fifth Amendment privilege "should questions be incriminating" (App. 8). The Justice Department retreated from this position only after the District Court issued its Protective Order.

¹²³ There is no force in the argument that the Speech or Debate Clause literally prohibits only questioning of Senators and Representatives. First of all, as we have emphasized, with perhaps tiresome reiteration, the Clause is to be read broadly to effectuate its purposes. Secondly, the present form of the Clause is clearly stylistic. The Committee on Detail in the convention wrote the Clause in subject-matter terms, following the English Bill of Rights:

"Freedom of speech and debate in the Legislature shall not be impeached or questioned in any Court or place out of the Legislature." III Documentary History of the Constitution of the United States 447 (1900).

people, that he seeks to vindicate, not any right or privilege that inheres independently in such aides and other parties.

It must be understood at the outset that the Senator's argument here is very limited. He does not argue that either he or his aides or other parties are bathed with any immunity from questioning where what they did, saw or heard was not a necessary and proper adjunct to a legislative act. Nor does the Senator here venture a view with respect to whether or not any party with whom he did or did not deal is bathed with any kind of immunity from prosecution or accountability.¹²⁴

In fact, we will assume that if the Senator personally had "stolen" the Pentagon Papers, and if such an act were a crime, then he could be prosecuted for that criminal act. Certainly, then, aides and other assistants could likewise be prosecuted.

But there has been no suggestion in this case that the

This provision was changed to the present form by the Committee on Style and the change was not mentioned as substantive. This Court has twice confirmed that the Clause is "substantially identical" to the English Bill of Rights. *Powell v. McCormack*, *supra*, at 502, n. 20; *United States v. Johnson*, *supra*, at 177-178.

¹²⁴ As counsel for Senator Gravel remarked in the District Court at the opening of this litigation:

"If we should, for instance, move to intervene and then it is determined that the issue before the grand jury for which Dr. Rodberg has been subpoenaed has nothing to do with the Senator, then we have no interest or right to be there. If, on the other hand, the questions for which the grand jury has subpoenaed Dr. Rodberg do relate to the Senator's activities, then we want to be very vigorous in our representation," (App. 42.)

Counsel for the Senator in the District Court further disclaimed any belief by the Senator that he could invoke his privilege to protect Dr. Rodberg from questioning with respect to activities, even activities relating to the Pentagon Papers, which predated the establishment of his aide relationship with the Senator. (App. 41.)

Senator or anyone working under his direction "stole" the Pentagon Papers. The investigation for which Dr. Rodberg, Howard Webber, and Beacon Press officials and others have been subpoenaed focuses directly and entirely on the preparation for the subcommittee meeting and the subsequent publication of the record thereof, and the finder of fact so stated. (S.G.P. 39.) To put the matter more precisely in the language of prior opinions of this Court, the Justice Department focuses its inquiry on acts "generally done" in a session of the legislature by a member in relation to the business before it.

1. The Inquiry Proposed by the Justice Department.

The Justice Department now acknowledges that the Speech or Debate Clause bars direct questioning of a member of Congress about his legislative acts. (S.G.P. 10.) Yet it seems evident that exactly the same constitutional evil may result from a grand jury inquiry into the congressman's legislative acts through the interrogation of everyone with whom he dealt. In the course of his legislative activities, a congressman must of necessity deal with many people, and the interrogation of them before the grand jury will accomplish by indirection precisely what the Justice Department concedes cannot be done directly—the intensive breach of the sanctity of the legislative process. The Executive, with the assistance of the grand jury, may, under the claim now advanced by the Solicitor General, investigate how a congressman wrote a speech, what materials were in his possession, what conversations he had prior to speaking out or voting on controversial issues, how he prepared for and held a hearing, how he made his speeches, reports and hearings available to the electorate, and why he engaged in any of these legislative activities. This case represents just such a situation. It is difficult to imagine a Senator adequately

preparing for and holding a committee hearing without the assistance of aides, or of performing the informing function adequately without the assistance of printers. The interrogation of Dr. Rodberg before the grand jury about the hearing, and of Webber and the Beacon officials about the publication of the record, would disclose *precisely* the same amount of information about the Senator's privileged activities as if he himself were called.

This kind of unrestrained intrusion¹²⁵ into privileged legislative activity is a clear and blatant violation of separation of powers. The Speech or Debate Clause was designed to serve the function of "reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson, supra*, at 178; Federalist No. 48 (Madison). See also I Works of James Wilson 299 *et. seq.* (McCloskey ed. 1967). Indirect and subtle breaches of separation of powers are just as prohibited as direct and massive violations, for, as the framers well understood, "power is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it." Federalist No. 48 (Madison).¹²⁶ Stripped of its verbiage, the issue here is a simple one: May the executive branch and the grand jury investigate the privileged legislative activities of a member of Congress? Unless the stone wall conception of the doctrine of separation of powers is reduced to a pleasant-sounding, but meaningless, metaphor, the answer must be emphatically "No."

¹²⁵ It is significant, in this regard, that the usual rules of evidence relating to relevancy, hearsay, etc., do not apply in the grand jury.

¹²⁶ "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

2. *The Inquiry Permitted by the Court of Appeals.*

The same basic principle of separation of powers forecloses the very substantial inquiry permitted by the Court of Appeals, which would allow the interrogation of all those except his personal aides who assisted the Senator in the performance of his legislative activities, so long as the "object is [not] to attack the legislator's motives in speaking." (P.W.C. 12a.) In so holding, the Court of Appeals misapprehended the holding of *United States v. Johnson*, *supra*, at 173-176, where this Court barred inquiry of anyone not only into motives but also into *how* the speech was prepared and into its precise ingredients. More fundamentally, the rationale of the Court of Appeals affords little, if any, protection to a member of Congress against intrusions by the executive and grand jury into privileged activity. Given the complexities of modern-day government, Congressmen must and customarily do require the assistance, cooperation and advice of persons outside their immediate staff in fulfilling the duties of their office. This inescapable fact of modern-day legislative life renders illusory the protection against unconstitutional inquiry announced by the Court of Appeals. Any protection which the Senator has from direct inquiry may be circumvented through the investigation of his privileged activity by the interrogation of private persons with whom he dealt about how he prepared and delivered speeches, votes, committee hearings and so forth.

The Court of Appeals apparently believed that an otherwise impermissible intrusion into the legislative process was legitimate if the interrogators disclaimed any intention to attack the Senator's motives. That this limitation does not ameliorate the patent violation of separation of powers is clear, for four reasons. First, and most basically, the unconstitutionality of a breach of separation of powers

does not depend on whether it was done out of good or bad intentions. Certainly no court would uphold a clear infringement of First Amendment rights because the executive branch acted in good faith; the same is true with respect to the absolute guarantee of the Speech or Debate Clause.¹²⁷ Second, if the executive branch and the grand jury may uncover every detail concerning the manner in which a senator, for example, decided to give a controversial speech, his motives for doing so are readily inferable. Third, this standard is unenforceable; the Court of Appeals rejected as "extraordinary" the Senator's motion that the Justice Department specify the purpose and nature of its proposed inquiries (P.W.C. 13a). And fourth, the reason that courts do not delve into the motives of legislators is that to do so would be "indecent, in the extreme." *Fletcher v. Peck*, 6 Cranch, 87, 3 L.Ed. 162, 176 (1810) (Marshall, C.J.) It is equally unseemly to pry into privileged acts. The District Court was therefore correct in holding that no witness before the grand jury could be questioned about Senator Gravel's privileged acts and his motives for performing them.¹²⁸

¹²⁷ Compare Mr. Justice Brandeis' celebrated statement in *Olmstead v. United States*, 277 U.S. 438, 479 (1928):

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

¹²⁸ Our only quarrel with the District Court's opinion is that it did not define privileged acts broadly enough, i.e., by excluding publication of the record from the protected area.

B. THE INVESTIGATION OF A SENATOR'S PRIVILEGED ACTS THROUGH THE INTERROGATION OF THOSE WHO ASSISTED HIM HAS THE SAME POTENTIAL FOR INTIMIDATION, HARASSMENT AND DISTRACTION AS IF THE SENATOR WERE QUESTIONED DIRECTLY.

The proposed inquiry by the Executive and grand jury into the Senator's privileged legislative acts, even under the limitations placed by the Court of Appeals, is directly violative of separation of powers; and the Executive has asked the assistance of the federal courts, by way of their compulsory process, in a manner which would indeed make the courts a party to an unconstitutional end. This provides ample reason for this Court to hold the inquiry barred by the Speech or Debate Clause.

In addition, the Executive's proposed inquiry runs afoul of the Speech or Debate Clause in another, albeit related, way. An important purpose of the Clause is to guarantee "practical security" to congressmen and to prevent "intimidation by the executive." *United States v. Johnson, supra*, at 179, 181. In considering this question, then, the courts must "look particularly to the prophylactic purposes of the clause." *Id.*, at 182. The Solicitor General has now conceded (what would appear in any case to be self-evident) that direct interrogation of a congressman about his legislative activities before the grand jury carries with it an obvious potential for intimidation and harassment. (S.G.P. 9-10.)¹²⁹ Yet it is a mystery why the Solicitor General does not recognize exactly the same potential in the interrogation of persons who assisted the congressman in executing his constitutional functions.

In its petition for certiorari, the Justice Department pointed out the one and only difference between the in-

¹²⁹ For historical examples of breaches of the privilege by inquisitorial bodies, see fn. 20, *supra*.

vestigation of a congressman's privileged conduct through personal questioning and the same investigation accomplished by the interrogation of those who assisted him in the performance of his duties; namely, that in the latter case his own time is not being expended in the grand jury room (S.G.P. 11). While the avoidance of this result is of course one purpose of the Clause, see *Powell v. McCormack*, *supra*, at 505, the major thrust of the privilege is to foreclose intimidation and harassment. Jefferson's and Madison's powerful protest against the intrusion and intimidation by the grand jury in *Cabell's* case was wholly independent of whether Cabell himself was interrogated personally, which apparently he was not. See pp. 53-58, *supra*. If a senator knows that the executive branch, and federal grand juries, may investigate every detail of his legislative activities as a result of his giving a controversial (or displeasing) speech or holding a committee hearing, or in casting his vote in a manner questioned by the Executive, he will certainly think twice before discharging his duties uninhibitedly. The result of permitting the interrogation of those who assisted him in his decision-making process would be to intimidate the legislator from seeking advice and assistance on controversial matters, which are those in which he needs it the most. It will also deter those who would render such assistance and then face the choice of breaching every confidence before the grand jury or going to jail for contempt. Finally, in terms of "distraction," we did not understand this Court in *Powell* to suggest that this term has only a temporal content. Manifestly, a congressman will not be oblivious to the fact that an intensive grand jury investigation into his privileged activities is occurring, with an uncertain scope and outcome, and this is bound to distract him from the maximum performance of his duties. And the fact that he had not been called may cut the other way. The congressman has no

right to be in the grand jury room during the secret, inquisitorial interrogation of those who assisted him, he cannot object to the most outrageous of inquiries, and he cannot even be sure of the degree to which the Executive and grand jury have intruded into his privileged conduct. It thus may be even more intimidating of a congressman for the Executive to intrude into his legislative activities, in circumstances where the interrogation is in a secretive chamber and is of those over whom he has no certain control.¹³⁰

C. PRIOR AMERICAN AND ENGLISH CASES HAVE PROHIBITED THE TESTIMONY OF NONMEMBERS ABOUT THE LEGISLATIVE ACTS OF MEMBERS.

On several prior occasions, courts in both the United States and Great Britain have held that a legislator may invoke the privilege to bar the interrogation of persons who assisted him in the discharge of his duties. While these cases are, in varying degrees, distinguishable from the present situation, each deals with the intercession of the speech and debate privilege to prevent the questioning of nonmembers with respect to the legislative acts of members.

In perhaps the situation closest to the instant case to have reached this Court, the Court held that it was error for the judiciary to allow *any* persons, including aides and complete outsiders, to be questioned with respect to a member's legislative acts. In *United States v. Johnson, supra*, four defendants were convicted under an indictment charging conspiracy to defraud and substantive acts under a conflicts of interest statute. The conspiracy counts alleged, essentially, that the defendants had conspired to defraud

¹³⁰ Grand jury transcripts are not readily available, and the District Court summarily denied Senator Gravel's motion for a transcript to be kept and made available to him. (App. 19.)

the United States of its right to have the official business of the Department of Justice conducted honestly and free of undue pressure and influence. As this Court described the "broad outline" of the conspiracy, two congressmen (including Johnson) agreed with two officers of a Maryland savings and loan institution, that the congressmen would exert influence on the Justice Department to obtain dismissal of a pending indictment against a loan company and its officers. As part of the conspiracy, Congressman Johnson was to give and did in fact give a speech on the floor of the House favorable to independent savings and loan associations. The two congressmen approached officials of the Justice Department and tried to influence them to drop the indictment. Congressman Johnson received fees allegedly disguised as "campaign contributions" for these services.

This Court did not discuss the case in terms of in what respects the Speech or Debate Clause protected Johnson in accepting a bribe¹⁸¹ or in applying unlawful pressure on the Justice Department. On the contrary, this Court specifically noted that:

"No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." *Id.*, at 172.

In other words, this Court considered the Speech or Debate Clause applicable only to legislative activities; and "influence peddling," particularly where it involved an in-

¹⁸¹The *Johnson* court did hold, however, that "a prosecution under a general criminal statute" so "dependent on . . . inquiries" necessarily touching upon the preparation for, delivery of, and motives behind a speech, "necessarily contravenes the Speech or Debate Clause." *Id.*, at 184-185.

trusion by the legislator into prosecutorial activities specifically delegated by the Constitution to the executive and judicial branches, could not be considered within the sphere of legislative duty.¹³²

But other of Johnson's activities, illegal and badly motivated though they may have been, were ruled by this Court to be within the clear ambit of and related to "the due functioning of the legislative process," namely, "the manner of preparation and the precise ingredients of the speech [and] the motives for giving it." *Id.*, at 175-176. In order to protect the Congressman's privilege under the Speech or Debate Clause, this Court held that it was error for the trial court to allow questioning of the Congressman, his administrative assistant, and outsiders representing the loan company, with respect to their knowledge of or participation in the preparation of the speech and its delivery. *Id.*, at 173-176. Thus, while the Court did not have to reach the question whether such aides and outside assistants and parties could be prosecuted and held criminally accountable for their participation in the Congressman's perhaps unlawful but nevertheless privileged acts involving the speech,¹³³ it prohibited any questioning of

¹³² Nor, in fact, is such "influence peddling" an act which is "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. at 204. See fn. 51, *supra*.

¹³³ "Only the question of the applicability of the Speech or Debate Clause to the prosecution of Johnson is before us. The Court of Appeals affirmed the convictions of co-defendants Edlin and Robinson [who were connected with the savings and loan association] whose appeals were consolidated with that of Johnson [in the Court of Appeals] and, except for a brief as *amicus curiae* submitted by Edlin, questions raised in those cases have not been presented to us. The defendant [Congressman] Boykin took no appeal from his conviction." *United States v. Johnson*, *supra*, at 172-173, n. 3.

anyone where that questioning involved protected legislative activities. Since the attempts to pressure and influence the Department of Justice were found to be outside the scope of legislative activities, the Government was not prohibited from questioning either the Congressman or his aides or other parties about that conduct.

It should be noted that this Court in *Johnson* was dealing with the trial of a criminal indictment. Yet the Court did not analyze the applicability of the Clause primarily in terms of any immunity from criminal prosecution afforded to either the member or his nonmember associates.¹³⁴ Instead, this Court chose to isolate the legislative acts from the nonlegislative acts and prohibit *questioning* of *anyone* regarding legislative acts.¹³⁵

English law is in accord. In *Ex parte Wason*, L.R. 4 Q.B. 573 (1868), a complainant charged that a nonmember conspired with two members of the House of Lords to deceive the House by making speeches in the House which they knew to be false and libellous of the complainant.¹³⁶

¹³⁴ And see fn. 133, *supra*.

¹³⁵ One might imagine a case where it is obvious from the face of an indictment that the criminal charge and a protected legislative activity are so intertwined that prosecution of the indictment necessarily would involve questioning delving into protected legislative activity. This is one of the questions being faced by this Court this term in the *Brewster* case, *supra*, but in the instant case only questioning, and not accountability, is involved. See also fn. 131, *supra*.

After Congressman Johnson was retried and convicted, he appealed on the ground that the indictment was void because original grand jury investigation violated the Speech or Debate Clause. The Court of Appeals stated that evidence taken by the grand jury was "constitutionally impermissible" but, citing the rule of *Costello v. United States*, U.S. (), held that this did not invalidate a facially sufficient indictment.

¹³⁶ The complainant in this case was the same person as the plaintiff in *Wason v. Walter*, *supra*, which established the right of members and printers to publish allegedly libellous speeches and reports.

Although this conspiracy was a crime under English law, *id.*, at 574-575, the Court held unanimously that no information could issue against *any* of the defendants. The gravamen of the charge was that the members improperly prepared and delivered speeches, which is privileged conduct. This conduct was immune from the cognizance of the courts for, as Mr. Justice Lush said:

"... [W]e ought not to allow it to be doubted for a moment that the motives ~~or~~ intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." *Id.*, at 579.

And Chief Justice Cockburn said:

"It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law." *Id.*, at 576.

The court thus did not allow the case to proceed against the members or outsider, for *either* charge would have required the introduction of testimony concerning the legislative acts of the members themselves.

This doctrine was also followed in *Rex v. Rule*, 2 K.B. 372 (1937), in which a legislator's constituent was convicted for publishing defamatory libels. He had written to his member of Parliament indicating that he had documents proving that a detective and a justice of the peace were guilty of criminal conduct. The member wrote the constituent, requesting that the constituent mail to him the

documents. "These can be forwarded to me with utmost confidence. . . ." *Id.*, at 377. The court attached particular significance to the fact that the member requested the information of his constituent in confidential fashion. *Id.*; at 376. Thereafter, the constituent sent the materials to the member, for which the former was prosecuted. Lord Hewart, C.J., writing for the court said:

"It is sufficient for the purpose of this case to say that in our judgment a Member of Parliament to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that constituency in relation to his office, has sufficient interest in the subject-matter of the complaint to render the occasion of such publication a privileged occasion. When once it is seen that a decision favourable to the appellant requires no more than this limited assertion of the interest of a Member of Parliament in the welfare of his constituents, it appears to us impossible to resist the conclusion that the conviction cannot be supported." *Id.*, at 380.

The court thus recognized that the imperative of free communication between a legislator and his constituents necessarily implies that the legislator can invoke his privilege to bar questioning of the constituent with respect to the privileged relationship.

It is essential to bear in mind in any analysis involving the testimonial privilege of the Speech or Debate Clause that the prohibition against inquiry extends *only* as far as is required in order to protect the congressman's legislative activities from being "questioned in any other place." Congressmen themselves are not immune from questioning,

nor from prosecution for that matter, with respect to non-legislative activities. Certainly, aides and others who assisted a congressman in *nonlegislative* acts could also be questioned and held accountable. And this Court has made clear that at least in one situation the privilege is not coterminous between a congressman and a party who assist him; when that party enforces an unconstitutional order, he may be subject to restraints by the courts, which have the obligation to protect individual rights. *Powell v. McCormack*, *supra*. *Kilbourn v. Thompson*, *supra*.

In keeping with this rather simple set of standards, this Court has dealt with several situations arising under the Clause after the *Johnson* case. In *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the Court was faced with a civil action arising out of the subpoenaing of an organization's documents and records in the name of a Senate subcommittee. The petitioners charged the respondents with an unconstitutional conspiracy with state officials. The chairman and legal counsel of the Internal Security Subcommittee of the Senate Judiciary Committee raised the Speech or Debate Clause in defense.

This Court upheld the dismissal of the action as against the Senator. There was no evidence that the Senator himself was a party to the conspiracy. With respect to the subpoena, the Court pointed out that the Senator was engaged "in the sphere of legitimate legislative activity" and he should neither be held liable nor even be made to spend time and energy defending the action. *Dombrowski v. Eastland*, *supra*, at 84-85. The Court noted that the Senator's immunity from liability for legislative acts was absolute. *Ibid.*

With respect to respondent Sourwine, the subcommittee's counsel, the Court stated that the immunity is "*less absolute, although applicable*, when applied to officers or employees of a legislative body, rather than to legislators themselves."

Id., at 85. (Emphasis added.) However, there was some question as to whether or not Sourwine conspired with Louisiana authorities to violate the plaintiffs' constitutional rights—a nonlegislative act. The Court was obviously satisfied that if indeed Sourwine committed any nonlegislative and illegal acts, he was *not* doing it in conjunction with the Senator or under his direction. This Court specifically ruled that “[t]he record does not contain evidence of [Senator Eastland’s] involvement in any activity that could result in liability,” and it further found that the Senator was engaged “in the sphere of legitimate legislative activity.” *Id.*, at 84-85. If indeed Sourwine committed the acts complained of, this Court must have been convinced that he was on a frolic of his own, in concert with illegally-acting state authorities. It was on this basis that the Court reversed a summary judgment granted to Sourwine below, and sent the case back for a hearing on his liability and, if necessary, damages. The rationale for this decision is quite simply that it was *not* necessary to hold Sourwine immune from either questioning or liability in order to protect the sanctity of the Senator’s legislative activities.

That this is the extent of the Clause’s “less than absolute” applicability to nonmembers of the legislative branch is confirmed by *Powell v. McCormack*, *supra*. Although the action was dismissed against the named congressmen defendants, this Court held that it had jurisdiction over the ministerial employees, such as the sergeant-at-arms, who had enforced an unconstitutional resolution. In so doing, they were acting as any law enforcement official who carries out an unconstitutional act and infringes an individual’s secured rights; and this Court had not only the power, but indeed the duty, under the doctrine of *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60 (1803), to examine the legality of the congressional act and vindicate the constitutional rights of Powell and his constituents. This intervention by the Court was not a breach of separa-

tion of powers; it was a classic example of preserving that doctrine. At issue only was the Court's duty to set aside an unconstitutional act; *the Court certainly did not suggest that the sergeant-at-arms or others could be questioned about how and why the congressmen decided to speak and vote the way they did.*

The result in *Powell* was dictated by the earlier decision of *Kilbourn v. Thompson*, *supra*, where the plaintiff challenged the constitutionality of a House resolution ordering his arrest and imprisonment for having refused to respond to a subpoena issued by a House investigating committee. The Court held the members completely immune from judicial inquiry, but upheld jurisdiction over Thompson, the sergeant-at-arms of the House, for false imprisonment, since the House had no power to punish for contempt in the circumstances, and the resolution leading to the arrest was constitutionally void. This Court in *Powell* summed up in one sentence the essential doctrine set forth consistently in all of the Speech or Debate cases until that time involving nonmembers:

"The Court first articulated in *Kilbourn* and followed in *Dombrowski v. Eastland* the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the *unconstitutional* activity are responsible for their acts." 395 U.S. at 504. (Emphasis added, footnote omitted.)

The cases thus uniformly make clear the proposition that unless the nonmember acts unconstitutionally, he cannot be "questioned in any other Place" while he is engaged in the member's legislative activities. And when unconstitutional infringement of another's protected rights forces the court to act under the *Marbury* doctrine, the courts will

act as gingerly as possible, dealing with the ministerial employees and not delving into the member's legislative activities or into any confidential relationships between member and nonmember.

D. THE INHIBITING EFFECTS OF A GRAND JURY INVESTIGATION INTO LEGISLATIVE ACTIVITY ARE HEIGHTENED WHEN PERSONS ARE INTERROGATED WHO RENDERED NECESSARY ASSISTANCE TO THE SENATOR IN MEETING HIS OBLIGATIONS.

We have shown in the preceding pages that both policy and the case law establish that any inquiry by the Executive, with the assistance of the grand jury, into the privileged activities of a congressman is barred by the Speech or Debate Clause because, first, it would amount to a clear violation of separation of powers, and second, because it carries such a high potential for intimidation, harassment and distraction of the congressman as to bring into play the prophylactic purposes of the Clause.

These principles are not dependent upon the identity or status of the person from whom privileged information is compelled, for the essential constitutional evil is the breach of the sanctity of the legislative process. In this case, however, an additional and significant element is added by the fact that the Executive seeks to accomplish its investigation of Senator Gravel's privileged conduct by interrogating his personal aide and printers whose assistance was indispensable in the execution of his legislative obligations.

There is now, and has been throughout Anglo-American legal history, good reason why courts have held that the legislative privilege may not be defeated by questioning or intimidating those who work closely with legislators, and particularly those who stand in a confidential relationship to the legislator. Some of these reasons are evident from the history; others are evident from the nature of legisla-

tive work, particularly in our modern, complex society and government.

1. *Aides.*

It is particularly unseemly in this case to have the executive branch seeking to thwart a legislator's privilege by questioning personal aides and assistants, since the Executive has long and consistently championed a testimonial privilege for executive aides—even though the Executive's privilege is not explicit in Article II. See *Barr v. Matteo*, 360 U.S. 564 (1959). The President has time and again refused to allow his personal aides to testify before Congress on matters concerning foreign policy. Very recently the President has invoked "executive privilege" in refusing to provide the House Government Information Subcommittee with documents and information relating to United States aid programs in Cambodia.¹²⁷ And numerous administrations, since the trial of Aaron Burr, have invoked this privilege against judicial inquiry in both criminal and civil proceedings.¹²⁸ On other occasions as well, the Executive has stressed the need for a confidential relationship between principals and aides, and in at least two recent cases has argued that the principal and the aide should be treated as one, the aide being the "alter ego" of the principal.¹²⁹ The reasons given by the Executive for assert-

¹²⁷ The New York Times, March 17, 1972, p. 7, col. 1.

¹²⁸ A number of such incidents are collected in Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. Bar J. 103 (Part I), 223 (Part II) (1949).

¹²⁹ In its petition for rehearing with suggestion for rehearing en banc filed with the Court of Appeals for the Fifth Circuit in *United States v. J. W. Robinson et al.* (No. 71-1058), the Justice Department argues that the signature of a close aide to the Attorney General should suffice to validate and authorize an electronic

ing that his privilege precludes questioning of his aides are equally applicable to the congressional privilege. As was stated by then-Assistant Attorney General (now Mr. Justice) Rehnquist in his written statement on executive privilege before the Foreign Operations and Government Information Subcommittee of the Government Operations Committee of the House: "It includes the confidentiality of conversations with the President, of the process of decision making at a high governmental level and the necessity of safeguarding frank internal advice within executive branch."¹⁴⁰ According to this official statement by the office of legal counsel of the Justice Department, the President not only can refuse to provide Congress with specific information and documents, but he can also refuse to allow "intimate advisors to appear as witnesses before Committees of Congress."¹⁴¹ In a spirit of evenhandedness that it appears to have forsaken in the instant case, the Department of Justice went on to add "that the integrity of the decision-making process which is protected by executive privilege in the Executive Branch is apparently of equal importance to the Legislative and Judicial Branches of the

interception application under 28 U.S.C. § 510, notwithstanding the statute's requirement of personal authorization by the Attorney General. "The practice of having a personal aide in whom an official must and does repose total confidence is well known and widely accepted not only in the executive branch, but in the legislative branch as well (cf. *United States v. John Doe, Mike Gravel, United States Senator, Intervenor*, Nos. 71-1331, 71-1332, 71-1335 (1st Cir.), decided January 7, 1972, slip op. at 11-12). The nature of such a relationship demands that the aide and the officer be treated as one," *id.*, Justice Department's brief at p. 6. In *Doe v. McMillan*, F. 2d (D.C. Cir. 1972), the Justice Department successfully argued for the privilege to extend to congressmen aides, the public printer and committee consultants, who aided a congressional committee to issue a report.

¹⁴⁰ Statement of William H. Rehnquist (June 29, 1971), at p. 11.

¹⁴¹ *Id.*, at p. 16.

government.”¹⁴² And one former member of the executive branch, the late Dean Acheson, emphasized the importance of protection of aides from testimonial subpoenas by analogizing them to law clerks of judges.¹⁴³

Similar arguments advanced consistently by the Justice Department prior to this have been accepted by this Court. In *Barr v. Matteo, supra*, a subordinate official in the executive department was sued for libel after maliciously issuing a press release which challenged the integrity of two critics and referred their names to Senator Joseph McCarthy. Barr’s only defense was that this communication fell within the executive privilege.¹⁴⁴ This Court agreed. After noting that the Court had created rules of absolute privilege to immunize judges and their staffs and executive officers of cabinet rank, in a manner paralleling the constitutional privilege of members of Congress, *id.*, 569-570, and observing that the reason for each privilege was that adverse court action would otherwise “inhibit the fearless, vigorous, and effective administration of policies of government” and “dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching dis-

¹⁴² *Id.*, at 19.

¹⁴³ Mr. Acheson gave the Separation of Powers Subcommittee of the Senate Judiciary a telling argument:

“There was a bill recently under consideration in the House to impeach a Justice of the Supreme Court—if it had gone through to impeachment, I am sure the Chief Justice would have ruled inadmissible the House manager calling upon the law clerks to testify as to their talks with the Justice. One cannot inquire into that confidential relationship. These are practical matters . . .” Executive Privilege: The withholding of information by the Executive, hearings before the Separation of Powers Subcommittee of the Senate Judiciary Committee, Statement of Honorable Dean Acheson (July 28, 1971), at 265.

¹⁴⁴ Barr was represented by an attorney from the Department of Justice.

charge of their duties," *id.*, at 571, this Court held that these considerations dictate its application to subordinate officials.

Reiterating the functional approach to privileges which we have endeavored to outline earlier in this brief, the Court stated:

"The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Id.*, 572-573. (Footnote omitted.)

Even closer to the factual setting of the instant case is the companion case to *Barr*, *Howard v. Lyons*, 360 U.S. 593 (1959). That case was a libel suit against a captain in the navy for preparing a memorandum to his immediate superior and publishing that memorandum by sending copies to members of Congress, concerning conditions in the Boston Naval Shipyard. Following the principles enunciated in *Barr*, this Court held Captain Howard to be immune from suit.

The *Barr* and *Howard* decisions therefore lend additional support to the thesis that official privilege, to be viable, cannot be constricted in an arbitrary manner which fails to take account of the realities of governmental life and the purposes of the privilege. It thus cannot exclude staff and other necessary confidential assistants. It seems indisputable that were Dr. Rodberg a member of the staff of a judge or executive official, or were Beacon Press officials

aiding the President in editing and preparing for publication a sensitive document of importance, they would be immune from questioning about official duties. Since the source of the privilege herein asserted is a provision of the Constitution which "itself gives an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session," *Barr v. Matteo, supra*, at 569, the scope of the congressional privilege surely must be given at least as much respect.¹⁴⁵

2. Printers.

The Court of Appeals, for unexplained reasons, drew an unbridgeable distinction between "aides" and "third parties" and proceeded to lump printers of legislative proceedings in the latter category. Yet such printers are hardly akin to persons who merely come into casual contact with a legislator. Unlike other private parties, printers play a

¹⁴⁵ Of course, insofar as the adoption of the common law executive privilege is justified by the separation of powers doctrine, the executive privilege might be seen as being of constitutional dimensions, although obviously less explicitly constitutional than the legislative privilege. It should be noted that the Court of Appeals in the instant case concluded that Senator Gravel was protected from questioning about the Pentagon Papers, even though the publication was not covered by the Clause, by a privilege akin to the common law executive privilege enunciated in *Barr v. Matteo, United States v. John Doe*, 451 F.2d 466 (1st Cir. 1972) (P.W.C. 10a-11a).

Similarly, the English Parliament has acted to guard against a seeming chink in the armor of its privilege of free speech. By the law of Parliament, "a clerk or officer of the House or shorthand writer employed to take minutes of evidence before the House or any committee thereof may not give evidence elsewhere in respect of any proceedings or examination had at the bar or before any committee of the House without the special leave of the House." *Commons Journals* (1818) 389. This was discussed favorably in the Report from the Select Committee on the Official Secrets Acts (1939) at p. ix.

unique and historic role in enabling a congressman to perform adequately an important duty of his office—informing his colleagues and the electorate. And as we have shown before, the framers believed that the Speech or Debate Clause would provide the people's representatives with enough of a fence around their activities so that they could freely contribute to enlightening the electorate. In discharging this obligation, it should go without saying that a congressman cannot be confined to the use of his xerox machine.

The issue of the degree to which the legislative privilege guards against the interrogation and intimidation of printers who assist legislators in executing the informing function is hardly a novel one. Historically, much litigation in England arose out of efforts to restrain printers from publishing Parliamentary proceedings. The outcome of this litigation has been the extension of the privilege to printers. The English courts have held that printers are immune not only from questioning, but even from accountability.

As has been pointed out, *supra*, for many years the Crown was brazen enough to wage virtual war with Parliamentarians who displeased the sovereign by aiming criticism at the royal house or its pet projects and prerequisites. But the Crown did not always choose to attack the member directly, particularly in later years when the powers of the monarch began to wane and those of the Parliament were on the rise. Furthermore, when a party other than the Crown chose to attack Parliament or a member thereof, that party often could not attack directly.

One of the more common avenues of attacking Parliament's privilege indirectly was to focus on those who published and disseminated the words spoken in the House and reports delivered in or to the House. The English courts at first held that the privilege had no application in these

circumstances, but these decisions were subsequently overruled by statute and by judicial decision.

In the case of *Stockdale v. Hansard*, 9 Ad. & E. 2, 112 Eng. Rep. 1112 (1839), the English courts refused to extend the Parliamentary privilege to a printer who published material at the specific direction of the House. Interestingly, the Court of Appeals in the instant case placed some reliance on this decision (P.W.C. 8a). The *Stockdale* case, however, while it might have found favor with the Court of Appeals, found no favor with the English Parliament which, in a monumental debate, excoriated the *Stockdale* court, and pronounced the opinion to be an aberration which would never occur again.

The debates precipitated by this decision took place almost immediately following it. The House of Commons was in a virtual frenzy because Stockdale had been able to recover damages against Hansard, who, upon the request and instruction of the Speaker of the House, had published and disseminated a report, presented by a prison inspector to a House committee, which was highly critical of the management of the prison at Newgate. The report mentioned Stockdale in an unfavorable light, and he sued Hansard and recovered on several occasions. The House grew frustrated at the multiple suits, and finally ordered Stockdale imprisoned while it debated how to deal with the situation.

Lord John Russell, a noted member of the House of Commons, presented the dilemma squarely at the outset and posed the alternatives. The House, he said, could retreat and "might have abandoned their resolution [to print the report]," or

"they might have determined to vindicate their powers upon the consideration that all necessary functions for legislation must be allowed to the House of Commons; and, conceiving the publication of its reports

to be one of its necessary functions, they might have proceeded to vindicate their privileges." 52 Parliamentary Debates (Hansard) at 253 (1840).

While no member was being attacked *directly* by Stockdale or by the King's Bench, nevertheless, said Russell:

"what [the Members of the House] had to consider was, in what manner their privileges were to be maintained; what they had to consider was, whether by any possibility they could allow the goods of a *servant of their House* to be seized because he had acted in execution of their order, and had printed their report, which was essential for their legislation; whether they could permit these goods to be *taken from themselves through their servant* and be handed over to the plaintiff" (Emphasis supplied.) *Id.*, at 255-256.

It was pointed out that this was a deviation from the prior law:

"When the House considered, however, that for many years the question had not been raised, when it had been thought, from the uninterrupted practice of Parliament ever since the Revolution, and from the recorded judgment of Lord Kenyon [in the case of *Rex v. Wright*, discussed *supra*, pp. 77-78], that there was little doubt upon the subject, and when they now found the judgment of a court of law impeaching that practice, they could but admit, that the sheriffs had an embarrassing duty to perform." *Id.*, at 256.

Lord Russell pointed out that in the *Wright* case, "another printer, and not . . . the printer of the House," had printed "voluntarily . . . the proceedings of a secret

committee of the House," and Lord Kenyon ruled that the printer could not be charged in a criminal information for libel since "[t]his report was first made by a committee of the House of Commons." *Id.*, at 258. Russell observed that until *Stockdale*, there was "no reason to doubt that such was the declared law" *Ibid.*

House Member Fitz Roy Kelly, in proposing a weakening amendment to Russell's proposed legislation to remedy the erroneous *Stockdale* decision, protested that only members should be able to claim the privilege for themselves, and that the privilege of free speech should not be extended so that "any man, with the Speaker's authority, might commit any crime, from the consequences of which he should be relieved when challenged in a court of law."¹⁴⁶ *Id.*, at 268. Some House members were in favor of the House indemnifying Hansard for the judgments against him, rather than asserting the privilege to encompass the printer.¹⁴⁷ One member felt that the printer should have stated the faults found in the prison, without mentioning *Stockdale's* name.¹⁴⁸

The Attorney General rose to expound on the prior law, pointing out that "[t]his was a privilege that had existed for upwards of two centuries," and that while printing was not known in the early days of the privilege, the privilege obviously had to extend to printers since "if they were any new mode by which information could be conveyed to the people, it might be adopted by the House of Commons from time to time." *Id.*, at 280. He pointed out that if the *Stockdale* case were allowed to stand, it would interfere with the

¹⁴⁶ This is an early "parade of horrors" to which the Government and the Court of Appeals have reverted.

¹⁴⁷ This was, for example, the substance of an amendment offered by Mr. Fitz Roy Kelly and seconded by Lord Eliot. *Id.* at 277-278.

¹⁴⁸ Speech of Lord Eliot. *Id.*, at 278.

House's functioning, since "there had been many persons like Mr. Stockdale, who, if they had thought that an action could be maintained, would have been anxious to place themselves in a similar situation." *Id.*, at 280. In modern tones echoing the functional approach to the privilege and the requirement that it protect legislative activities, not nonlegislative activities which happened to be committed by a Parliamentarian or his aide or printer, the Attorney General denied that under his interpretation of the privilege the courts could not interfere in a case, for example:

"where a House of Parliament clearly travelling beyond its jurisdiction should make an order so monstrous, illegal, and preposterous, that no attention ought to be paid to it. For instance, if the House of Commons were to order a man to be put to death for some supposed offence. Would any one deny that to make an order as to the publication of papers essential to its proceedings was within the jurisdiction of Parliament?" *Id.*, at 282.¹⁴⁹

One of the most eloquent and influential speakers in these debates was the great Parliamentarian, Sir Robert Peel. He noted that those papers which it is "most necessary and the most important to publish, were necessarily and unavoidably of a character to afford ground for legal proceedings, if not protected by privilege of Parliament." *Id.*, at 305. He urged the House to bear in mind at all times the *purpose* and *object* of the privilege, and to consider the accomplishment of such purpose more important than the harm or embarrassment which might

¹⁴⁹ The British Attorney General's position on the limits of the privilege in civilized society was apparently adopted by this Court in *Kilbourn v. Thompson*.

be caused to persons objecting to the privileged act. *Id.*, at 305-306. He read off a long list of grave abuses, from slavery to official corruption, which were remedied because members of Parliament were free to print and publishers were free to circulate "information directly bearing on the character of individuals, frequently containing matter of which there might be great reason to complain," but if restraint were imposed upon the publication of such matter, "it was impossible that a representative constitution could work to advantage." *Id.*, at 307. He continued:

"[T]here would have been great reason to complain if, instead of defending themselves from these charges, the parties concerned in the administration of the law had stifled the accusation by proceeding, as in the case of Hansard, against someone, for the publication of the charges." *Id.*, at 307.

Peel went on to excoriate that part of the *Stockdale v. Hansard* judgment which held that when publishers distribute House proceedings to the outside world, they are "individuals acting on their own responsibility":

"What a mockery was this! The Speaker, in the exercise of an admitted privilege, ordered Mr. Hansard to do a certain act, *which could only be done out of the walls of Parliament*, and the moment that Mr. Hansard set to work to execute that order, the privilege of the House was lost, and its agent liable to be punished by a court of law." *Id.*, at 335. (Emphasis supplied.)

He stressed, thus, that members were helpless to disseminate to their constituents important information without the aid of printers who necessarily had to work "out of the walls of Parliament," and that the free speech privilege, without such a logical extension, was a mockery.

The position advocated by Lord John Russell and Sir Robert Peel, and by the weight of prior precedent, won the day, and in the year after the *Stockdale v. Hansard* decision, Parliament enacted the Parliamentary Papers Act, 3 & 4 Vict., c. 9 (1840), which provided that criminal or civil proceedings against any persons for publication of papers printed by order of either House were to be stayed. The Act was prefaced by the claim that "it is essential to the due and effective . . . [functioning] of Parliament . . . that no Obstructions or impediments should exist to the Publication of . . . Reports, Papers, Votes, or Proceedings" and that there were of late too many vexatious lawsuits against printers which threatened to hinder such publication. The Parliament did not purport in this act to reverse the decision in *Stockdale v. Hansard*, so much as it proclaimed that the privilege set forth in the statute was long part of the common law and merely required a convenient procedural device for a defendant printer to assert in order immediately to stay the effect of any subpoena and ultimately to defeat any proceeding against him.¹⁵⁰

The persuasiveness of *Stockdale v. Hansard* as precedent for the Court of Appeals' or the Solicitor General's position, is further vitiated by the fact that, it was, at least *sub silentio*, overruled in the later case of *Wason v. Walter*,

¹⁵⁰ Thus, the Act provided that once a lawsuit was begun against a publisher, it would end upon production of a certificate in court to the effect that the printer was acting by order of either House. The preamble to the Act sees the Act as a mere remedy for obtaining "more speedy protection" than was theretofore available. This is not unlike the concern of American courts that the mere threat of litigation might be sufficient to deter a legislator, and that the Speech or Debate privilege should be assertable at the earliest stage possible, preferably on a motion to dismiss or motion for summary judgment. See *Powell v. McCormack*, 395 U.S. at 505-306, especially n. 25.

L.R. 4 Q.B. 73 (1868).¹⁵¹ in this case, the defendant printer published in a newspaper a report of a parliamentary debate in which a member disparaged the character of the plaintiff. The court went into an explanation of the informing function, *id.*, at 89, and concluded that in deciding the case the court had to take into consideration "the difficulty in which parties publishing parliamentary reports would be placed" if their publishing activities in this sphere went unprivileged and unprotected. *Id.*, at 90. Thus did the court recognize that to allow a printer to be harassed was the functional equivalent of allowing members of Parliament to be harassed: "[T]he difficulty in which parties publishing parliamentary reports would be placed" would be also the difficulty in which members would be placed in their efforts to perform their informing and other legislative duties. The court concluded with the observation that in the event that any publisher ever ran afoul of Parliament's desires with respect to publication of a specific item, Parlia-

¹⁵¹ Despite some attempts to distinguish the case from *Stockdale*, and even a passing comment that *Stockdale* was left undisturbed, one must honestly conclude that *Wason* did indeed overrule *Stockdale*. One distinction proffered was that *Stockdale* involved a publication which maliciously aimed at damaging an individual, while in *Wason* the publication was aimed primarily at reporting the proceedings of the Parliament for the information of constituents. *Wason v. Walter*, *id.*, at 95. It would appear clear that *Stockdale* also involved the function of informing constituents. Furthermore, the *Wason* court made it as clear as it could that, while the Parliamentary Papers Act, 3 Vict. c. 9, was "passed in consequence of the decision in *Stockdale v. Hansard*," *id.*, at 92, nevertheless it was not passed because there was thought to be any need "to fix the legality of the publication of parliamentary debates on the sure foundation of statutory enactment," *id.*, at 92; rather, the Act was probably passed as much because of "apprehension" caused by some language used in *Stockdale* "as by any conviction of the defectiveness of the law." *Id.* Finally, the *Wason* court approvingly cited *Rex v. Wright*, 8 T. R. 293. See discussion at 77-78, *supra*.

ment could deal with the matter without judicial interference:

"Should either house of parliament ever be so ill-advised as to prevent its proceedings from being made known to the country—which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the house and the publisher." *Id.*, at 95.¹⁵²

The English courts have thus recognized that a legislator cannot accomplish the informing function alone. While he does not need the army of subordinates which the President needs to accomplish his work, nevertheless he must have at least adequate assistance. The precedents for a senator's using private printers to accomplish this task are numerous in our history,¹⁵³ and while there are precedents for attacks on such publishers for aiding legislators, such attacks have been rebuffed in circumstances akin to those in the instant case. This is not to say that any person (or even any congressman or his aide) is free to break the law and steal documents merely because he subsequently "cleanses" his deeds by turning them over for introduction into the legislative process.¹⁵⁴ All aspects of the original

¹⁵² Similarly, while the Constitution mandates that a "journal" be kept of congressional proceedings, it also allows Congress some leeway in using its discretion to keep certain matters secret. Art. I, sec. 5.

¹⁵³ See pp. 85-88, *supra*.

¹⁵⁴ Precisely such a misconception led the Court of Appeals to imagine an entire "parade of horrors" in the event that illegal acts were allowed to be "cleansed" by introducing them into a Senate subcommittee's proceedings. "... the consequences of such an unlimited absolute privilege would be staggering." *United States v. Doe*, 451 F. 2d 466 (1972). The court felt that Senator Gravel was claiming that by "immersing" the papers in a subcommittee record, he would be retroactively cleansing all events

acquisition may be investigated, except, of course, by inquiries into the legislative process itself. The privilege goes no further than the legislative process.

The fact that legislators and those who assist them in performing their constitutional duties become immune from inquiry into those aspects of their work involving the legislative process does not mean that they are entirely immune from questioning, much less from punishment for abuses and for illegal conduct. Quite the contrary is true. English and American legislatures have broad powers to discipline and punish not only their own members, but aides and "outsiders" who, while engaged in legislative work, run afoul of some standard of law or of decency. From the earliest days of our jurisprudence our legislatures have claimed, and our courts have upheld their claims to, such powers.

In the landmark case of *Anderson v. Dunn*, 6 Wheat. 204 (1821), this Court upheld the power of the Congress to punish contempts committed by members and nonmembers alike, including the power to imprison.¹⁵⁵ While such drastic powers in the hands of legislatures have been to some extent curtailed (see, for example, *Kilbourn v. Thompson*, *supra*), and while the requirements of due process of law have been read into such powers (see *Groppie v. Leslie*,

leading up to the papers being obtained and turned over to the Senator. *United States v. Doe*, Opinion on Rehearing, F. 2d

Quite to the contrary, Senator Gravel does not seek to protect any aspect of or actor in the Pentagon Papers case other than his acquisition (not his source's acquisition) of them, his staff's preparation of the papers for the subcommittee hearing, and Beacon Press' preparation of the papers for publication and its ultimate publication and distribution of them.

¹⁵⁵ *Anderson* involved an attempt by a non-member to bribe a member to give a speech.

U.S.), nevertheless such powers still undoubtedly exist. See *Groppie v. Leslie*, *supra*.¹⁵⁶

The Congress has, in addition to its powers to punish, other methods for controlling abuses of privileges. These were summed up by the select committee of the House of Commons, which was assigned to study the problems engendered by claims by the Crown that Parliamentarians were bound by the provisions of the Official Secrets Act which allowed interrogation by the Attorney General of persons suspected of knowing of security leaks. Said the committee in its final report:

"The House of Commons has disciplinary powers over its members, and a member who abuses his privilege of speech may be punished, not merely by suspension from the service of the House, but by imprisonment or expulsion from the House, or both. Expulsion at least cannot be considered a light penalty. It is not so much on penal sanctions, however, that Your Committee would desire to rely for the prevention of abuses of parliamentary privilege prejudicial to the safety of the realm; as on the good sense of members themselves, who are as much concerned as ministers to prevent such abuses. Their inquiry has . . . brought home to members the need for discretion on their part in framing questions or seeking information regarding matters which affect the safety of the realm, and has impressed upon ministers of the Crown that the powers conferred upon the executive by the Official

¹⁵⁶ See also *Cochran v. Couzens*, 42 F. 2d 783 (D.C. Cir. 1930), where the court granted the defendant Senator absolute immunity from a slander action complaining of words uttered in a Senate speech. The *Cochran* court felt that all that could be done was to send the plaintiff to the Senate to ask that the defendant's peers impose a remedy, presumably under art. 1, sec. 5, cl. 2 of the Constitution. 42 F. 2d at 784.

Secrets Act must not be used in such a way as to impede members in discharging their parliamentary duties." Report from the Select Committee on the Official Secrets Acts, *supra*, at xv.

As Clement Attlee said in a House of Commons debate concerning effort by the Crown Attorney General to question a member of Parliament concerning the source of his acquisition of classified defense secrets:

"Unless Members of Parliament can have reasonable access to knowledge they cannot criticize ministers effectively. It is our duty to criticize Ministers who are in charge of the administration.

"In practice Members of Parliament do not abuse their privileges; we are not a House of spies and traitors, and the House has its own method of dealing with Hon. Members and of keeping them within bound. I think it is essential for the life of this House that this House itself should make itself responsible for Hon. Members. There is a danger in any suggestion that there should be some outside-court or sanction brought in." Debate in Sandys' case, Commons Journal, June 30, 1938, at 2167.

E. A BALANCING OF COMPETING SOCIAL INTERESTS DICTATES THE RECOGNITION OF THE PRIVILEGE IN THIS CASE.

This Court's vindication of the privilege in the case at bar would not, contrary to the Solicitor General's asserted fears, open up a Pandora's box for law enforcement and the administration of the criminal laws. First of all, as the paucity of reported American cases on the subject shows,

it is rare indeed that a legislator by himself, or in concert with nonmembers, acts within the legislative sphere in such a way as to run afoul of the civil or criminal law. In some cases, where the victims of civil abuses have sought redress, the courts have found the authority to grant relief in order to protect constitutional rights. *Powell v. McCormack*, *supra*; *Kilbourn v. Thompson*, *supra*; *Dombrowski v. Eastland*, *supra*; *Hentoff v. Ichord*, *supra*. In other cases, legislatures have exercised their powers to discipline or punish wayward members and nonmembers alike without courting or allowing interference from other branches. *Anderson v. Dunn*, *supra*; *Groppie v. Leslie*, *supra*. In still other cases, where criminal infractions were involved, Congress has sought narrowly to delegate powers to the judiciary. *United States v. Brewster*, *supra*.

Secondly, even in exceptional cases, an investigation can be conducted without inquiry into legislative activities. Where both legislative and nonlegislative conduct are involved, the legitimate area of inquiry can be segregated by a specification of questions that the Executive intends to ask prospective witnesses before the grand jury,¹⁵⁷ or some similar form of relief can be fashioned to accommodate the ends of the privilege and the demands of justice.

This Court has not hesitated to impose serious limitations upon law enforcement investigations which intruded into constitutionally protected conduct. When inquiries of

¹⁵⁷ While Senator Gravel asked the District Court to quash the subpoena altogether, he did offer the alternative that the Justice Department be ordered to specify the questions which it intended to ask of the Senator's aides and associates. (App. 2, 12.) With such a protective order, the Senator would have been satisfied to have the subpoenaed witnesses appear before the grand jury, since he would then not have to guess whether or not the witness would be constant in his refusal to violate the privilege, or worry that the witness' interpretation of the matters protected might differ from his own.

other investigative bodies of stature at least equal to the grand jury were perceived to have an inhibiting effect on the exercise of First Amendment rights, those investigations were not allowed to proceed unchecked and the Government was required to *at least* make a showing of a specific and compelling reason, factually supported, for the inquiry. See, *e.g.*, *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825 (1966), and cases cited therein. Even judged under these standards, which were imposed in areas where there were no separation of powers considerations, the present inquiry would not be permitted. The Justice Department has offered no reason at all—let alone a specific and compelling one—for its investigation into Senator Gravel's legislative activities, although it was given ample opportunity to do so in the lower courts. It takes more than unspecified and purely hypothetical claims of impeding law enforcement to counterbalance a constitutional right of this magnitude; otherwise, there is nothing to prevent virtual fishing expeditions into the Capitol. And surely there is no reason why the grand jury, which is subject to the supervisory powers of the federal courts, should be allowed to conduct an inquiry which would be prohibited of other investigative bodies under conditions involving constitutional rights which, unlike the Speech or Debate Clause, are not absolute.

Finally, it must frankly be admitted and accepted that in a very few hypothetical cases, it is possible that wrongdoing will go unquestioned, uninvestigated, or unpunished because the courts will be found to be without jurisdiction over the offense and the legislature will look aside, perhaps for political reasons or out of solicitude for a member or employee of the legislature. Yet this is an inevitable consequence of our constitutional system. Such results are frequently seen where, for instance, confessions are rendered inadmissible due to the circumstances of their

procurement, and where indictments are defeated because of technical considerations involving territorial jurisdiction or statutes of limitations. It can safely be predicted that far fewer cases of culprits evading justice will result from centuries of vigorous enforcement of the Speech or Debate Clause than result every year from enforcement of portions of the Constitution found in the various amendments. And as Pitt stated in his famous protest against Parliament's notorious action in stripping Wilkes of his privileges upon the claim of the Crown that law enforcement was being paralyzed:

"Let the objection, nevertheless, be allowed in its utmost extent, and then compare the inexpediency of not immediately prosecuting on one side, with the inexpediency of stripping the Parliament of all protection from privilege on the other. Unhappy as the option is, the public would rather wish to see the prosecution for crimes suspended, than the Parliament totally unprivileged, although notwithstanding this pretended inconvenience is so warmly magnified on the present occasion, we are not apprised that any such inconvenience has been felt, though the privilege has been enjoyed time immemorial." 342 *Protests*, 68, 73-74 (1763).

It is not terribly probable that a parade of horrors is any more likely to follow this Court's vindication of the privilege in the case at bar than has been true in hundreds of years of English and American history. The occasional instances in which law enforcement is hindered are more than counterbalanced by the preservation, intact, of our system of separation of powers.

"The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency

but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926). (Brandeis, J., dissenting).

In addition, the privilege remains the member's and the right to assert it is his alone. See *Rex v. Rule*, 2 K.B. 372 (1937). He can at any time refuse to assert the privilege with respect to the questioning of a wayward aide or associate who foolishly relied on anticipated legislative privilege in violating a law in the course of his legislative work for the senator. A senator should not be presumed to be lightly willing to raise his privilege to prevent questioning of an aide or associate who has, in the senator's judgment, placed the interests of the Nation upon too low a plane. To cite again the assertion of Mr. Attlee during the British Official Secrets Acts debate, *supra*: "[W]e are not a House of spies and traitors"

Courts should not see such privileges as being at all novel or startling. Privileges of lesser magnitude than the constitutional Speech or Debate privilege are vindicated daily in our courts. The attorney-client privilege is absolute unless waived by the client. The same applies to the priest-penitent privilege, the husband-wife privilege, and, in some jurisdictions, to the doctor-patient privilege. In cases involving such privileges, it matters not who is questioned or accused—the privilege stands with respect to the protected relationships or situations or endeavors. To deny protection to legislative relationships, situations and endeavors in the face of such clear mandate in the Constitution, Anglo-American history, and public policy would be one of the most serious breaches of separation of powers imaginable. This is a narrow case, and a hard-core case. It is not, as

the Solicitor General suggests, on or near the frontiers of the privilege. The simple question, stripped of verbiage and adornment, is whether the executive branch and the grand jury can breach the separation of powers, in the face of specific constitutional prohibition, by conducting an intensive investigation of the activities of the legislative branch. Whether such an investigation is conducted with or without direct questioning of a member is entirely irrelevant in both law and common sense.

Conclusion.

The framers of our Constitution believed that representative democracy could best be served if members of Congress were given unlimited freedom in actions within the scope of their legislative activity. They know that the privilege might be occasionally abused, but they also wisely understood that the risks to democracy in anything less than an absolute privilege, broadly construed and interpreted, was much greater. This perception is as true today as when the Constitution was written. "In the final analysis, no task is likely to be more important to the preservation and ultimate vitality of our governmental system of separation of powers than the widespread popular acceptance of the doctrine of legislative privilege in its most unwavering, pristine and absolute terms." *Cella, supra*, at 43. That is the theory of our Republic.

Senator Gravel respectfully submits that this Court should hold that: (a) the publication by the Senator of the official record of a Senate Subcommittee is encompassed by the protections of the Speech or Debate Clause, and (b) no

witness may be questioned before the grand jury about the Senator's privileged activities.

In No. 71-1026, the judgment should be affirmed.

In No. 71-1017, the judgment should be reversed.

Respectfully submitted,

ROBERT J. REINSTEIN,

CHARLES L. FISHMAN,

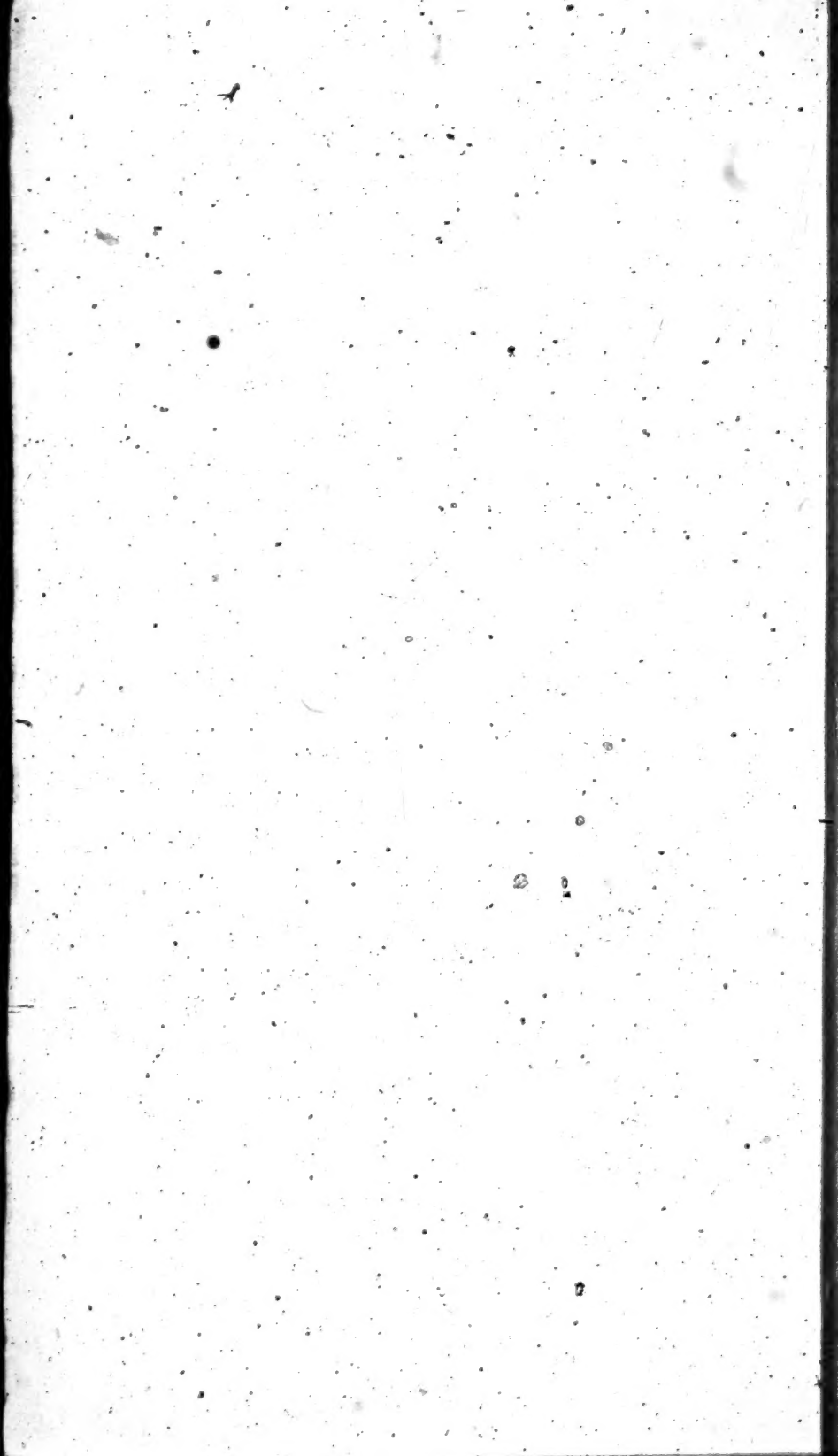
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APR 8 1972

Nos. 71-1017 and 71-1020 MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

MIKE GRAVEL, UNITED STATES SENATOR, PETITIONER

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

v.

MIKE GRAVEL, UNITED STATES SENATOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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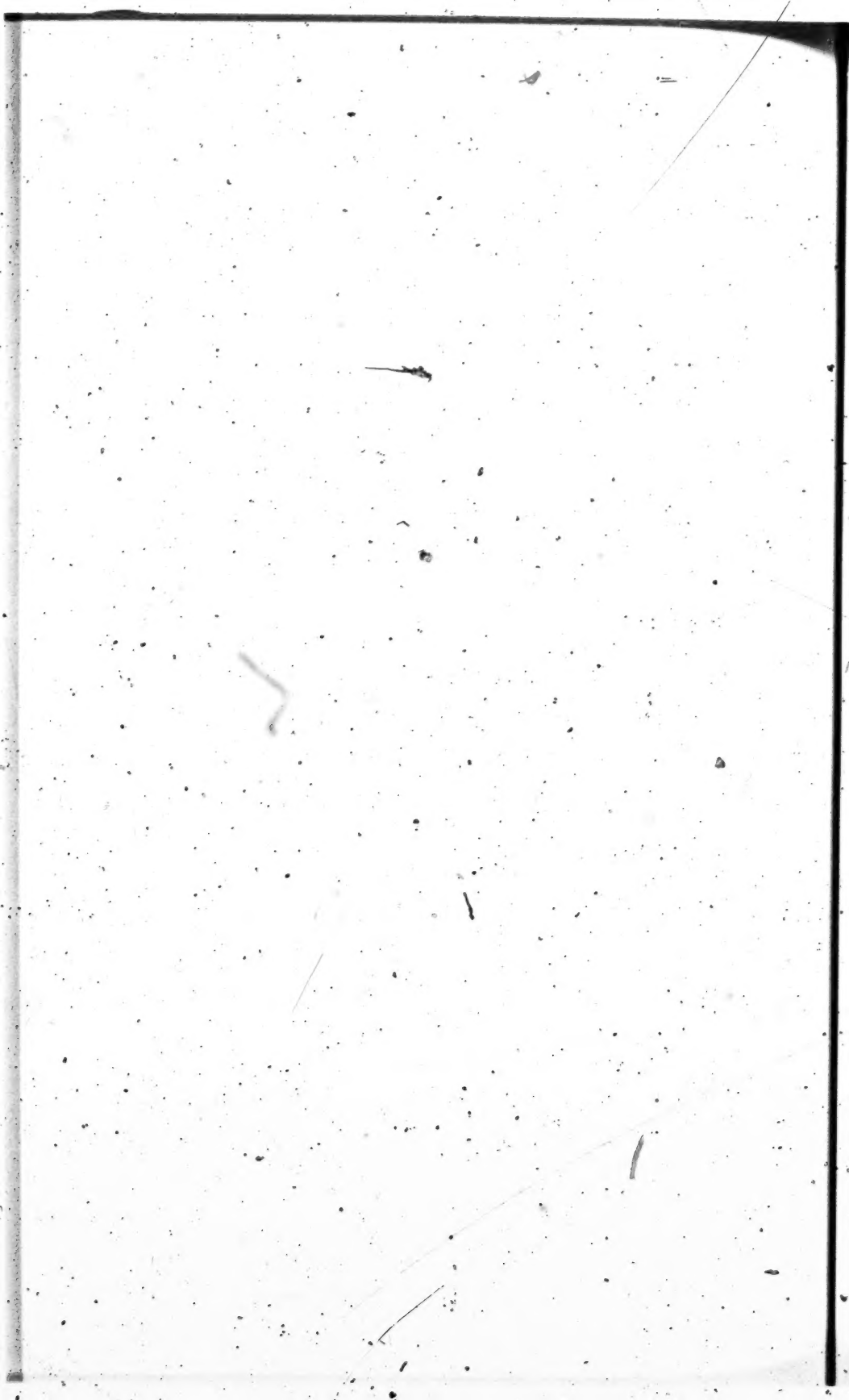
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1017

MIKE GRAVEL, UNITED STATES SENATOR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-1026

UNITED STATES OF AMERICA, PETITIONER

v.

MIKE GRAVEL, UNITED STATES SENATOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

Neither the original opinion of the court of appeals (Appendix A, Pet. No. 71-1026)¹ nor its opinion on rehearing (Pet. App. B) is yet reported. The Memorandum of Decision and Protective Order of the district

¹ The references in this brief to "Pet. App." are to the petition in No. 71-1026.

court (Pet. App. D) is reported at 332 F. Supp. 930.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1972. The petition for a writ of certiorari in No. 71-1017 was filed on February 9, 1972, and the petition in No. 71-1026 was filed on February 10, 1972; both were granted on February 22, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause of the Constitution (Art. I, Sec. 6) bars a grand jury from questioning aides of members of Congress and other persons about matters that may touch on activities of a member that are protected "Speech or Debate."

2. Whether the Clause bars a grand jury from questioning Congressional aides and other persons about private republication of material that a Congressman had introduced into the record of a hearing before a Congressional committee.

3. Whether Congressional aides have a common law privilege to refuse to testify before a grand jury about such republication.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 6 of the United States Constitution provides:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of

the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

STATEMENT

Late in the evening of June 29, 1971, Senator Mike Gravel of Alaska convened a public hearing of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee and read aloud extensive portions of a classified study prepared by the Department of Defense, popularly called the Pentagon Papers,² which he had "unauthorizedly" (Pet. App. A, p. 18) obtained. At the close of the hearing, he placed the entire study, comprising some 7,000 pages of material in 47 volumes and bearing an overall defense security classification of TOP SECRET, SENSITIVE, in the public subcommittee record.

Earlier that day, Dr. Leonard S. Rodberg, a physicist and resident fellow at the Institute for Policy Studies in Washington, D.C., had been engaged as a staff member by Senator Gravel; he assisted the Senator in preparing for and conducting the subcommittee hearing. Thereafter, Dr. Rodberg assisted Senator Gravel in negotiating with several publishing firms for private republication of the study. An agreement

² The facts and procedural history of this case are set out in the opinion of the court of appeals (Pet. App. A, pp. 18-19) and the opinion of the district court (Pet. App. D, pp. 38-39, 41-43).

was ultimately concluded with Beacon Press, of Boston, to publish a four-volume work entitled "The Senator Gravel Edition of the Pentagon Papers: the Defense Department History of Decision Making on Vietnam"

On August 27, 1971, a federal grand jury sitting in Boston, Massachusetts,^{2a} subpoenaed Dr. Rodberg to appear as a witness. Dr. Rodberg moved to quash the subpoena, and Senator Gravel was allowed to intervene in support of the motion. Senator Gravel argued that Dr. Rodberg, as his legislative aide, was protected by the Speech or Debate Clause from any inquiry regarding the meeting of the subcommittee and efforts by Rodberg, on behalf of the Senator, to publish the study.

The district court denied the motions to quash. It ruled, however, that Senator Gravel's privilege under the Speech or Debate Clause limited the subjects about which the grand jury could question Dr. Rodberg. The court held that "the Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally" (Pet., App. D, p. 51). The court further ruled that the arrangement for private republication of the study by Beacon Press was not within the Senator's privilege and therefore that Dr.

^{2a} The grand jury was investigating the following possible crimes: the retention of public property or records with intent to convert (18 U.S.C. 641), the gathering and transmitting of national defense information (18 U.S.C. 793), the concealment or removal of public records or documents (18 U.S.C. 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. 371) (Pet. App. A, p. 19).

Rodberg could not refuse to testify before the grand jury concerning that matter. The court entered the following order (Pet. App. D at 52):

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor about things done by the Senator in preparation for and intimately related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting.

While the district court proceedings were pending, a grand jury subpoena was served on Howard Webber, Editor of the Massachusetts Institute of Technology Press, with which ultimately unsuccessful negotiations for republication had been carried on. The district court issued a supplemental order staying both subpoenas. After notices of appeal had been filed, the court of appeals granted Senator Gravel's motion for a stay pending appeal and halted the grand jury's inquiry until further order.

Both sides appealed and the court of appeals affirmed the district court's order with modifications (Pet. App. A, pp. 31, 36-37).

The court of appeals rejected the government's argument that questioning before a grand jury about—as opposed to civil or criminal liability for—legislative conduct was not within the protection afforded to Speech or Debate.³ The court reasoned that, even when there is no danger of criminal prosecution or civil liability, a legislator might be intimidated and harassed by questioning and could be hindered in performing his legislative responsibilities (*id.*, pp. 22-23).

The court next ruled that under the Speech or Debate Clause a grand jury could not inquire into a Congressman's antecedent conduct in obtaining information for use in a Congressional proceeding. The court stated: "allowing a grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them" (*id.*, p. 24). The court held, however, that the Clause does not cover private republication after the legislative speech (*id.*, pp. 24-28). But it ruled that a legislator causing such republication "may be protected from liability by a common law privilege" (*id.*, p. 28) akin to that of an executive official, citing *Barr v. Matteo*, 360 U.S. 564. The court then held, however, that this privilege means that a legislator "may not be questioned at all as to republication" (*ibid.*).

³ Initially the court held that Senator Gravel as an intervenor could properly appeal from the refusal to quash the subpoenas directed to Rodberg and Webber, on the ground that he would have no other method of testing the validity of the subpoenas and that compliance with the subpoenas would irreparably injure him (Pet. App. A, pp. 19-20).

The court then turned to the questions whether, and to what extent, the Speech or Debate Clause and common law privilege protect persons other than members of Congress. Viewing "personal aides in whom he reposes total confidence" as "indispensable" to a Congressman, the court held that legislative aides are afforded the same protection as a Congressman himself with respect to events related to their responsibilities during their period of employment (Pet. App. A, p. 29). On the other hand, a legislative aide "is not protected from inquiry as to events unconnected with intervenor at the time of occurrence" (*ibid.*).

Finally, the court considered the claim of privilege by third parties dealing with a Congressman or his aides. Relying upon its interpretation of *United States v. Johnson*, 383 U.S. 169, the court held that "any person who dealt with a legislator with respect to speech or debate cannot be inquired of if the object is to attack the legislator's motives in speaking" (Pet. App. A, p. 29). On the other hand, the court ruled that such third parties could be questioned "as to their own conduct regarding the Pentagon Papers including their dealing with intervenor or his aides" (*id.*, p. 30).

The court entered the following order (as modified in its decision on petition for rehearing):

- (1) No witness before the grand jury recently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are di-

7 7
rected to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions "in the broadest sense, including observations and communications, oral or written, by or to him, or coming to his attention" while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment. [Pet. App. C, pp. 36-37.]

SUMMARY OF ARGUMENT

I

Article I, Section 6 of the Constitution provides that "Senators and Representatives * * * for any Speech or Debate in either House * * * shall not be questioned in any other place." This language is pre-

Mr. Justice Brennan granted on January 24, 1972, a stay sought by Senator Gravel, thus leaving in effect the following order entered by the Court of appeals on November 29, 1971:

"It is ordered that the grand jury may pursue its inquiry into crimes relating to the so-called Pentagon Papers, provided that neither Senator Mike Gravel nor any member of his staff or of the staff of the Subcommittee on Buildings and Grounds shall be subpoenaed to testify, and no witness shall be questioned concerning the acquisition, use, publication, or republication of the Pentagon Papers by Senator Mike Gravel or by any member of the staff as above defined, until further order of this court. The restraining order entered October 29, 1971 shall remain in full force in all other aspects until further order of this court."

cise in protecting only members of Congress themselves and its limited scope cannot be attributed to inadvertence or a failure to foresee the modern roles of legislative aides, since the framers knew that there would be employees of the Houses of Congress who might have been protected and were aware that the privilege against arrest, contained in the same clause, had been extended to servants and family members at an earlier time in England.

The privilege of freedom of speech of the English Parliament extended only to members of Parliament. The Parliamentary privilege against arrest, which had earlier reached servants and family members, had been sharply cut back to protect only members of Parliament by 1769, and the language of Article I, Section 6 represented an attempt to avoid the abuses that had arisen from the extended privilege. *Thomas Jefferson's Manual of Parliamentary Practice* of 1801 explained: "It was probably from this view of the encroaching character of privilege that the framers of our Constitution * * * have only privileged Senators and Representatives themselves * * *"

This Court's decisions strongly support the position that the Speech or Debate Clause does not reach those who are not actually members of Congress. In *Kilbourn v. Thompson*, 103 U.S. 168, and *Powell v. McCormack*, 395 U.S. 486, the Court held that members were exempt from suit under the Clause but that employees were not so protected. In *Dombrowski v. Eastland*, 387 U.S. 82, the Court similarly found a member of Congress, the chairman of a subcom-

mittee, not subject to a civil action, while holding that the action against an employee, the counsel to the subcommittee, could proceed to trial. Since the chairman and the counsel obviously had a close working relationship, it was inevitable that at trial questions relating to the Senator's conduct would be asked, yet the Court did not suggest any limits to the kinds of questions that might be asked. In all three of these cases, and particularly in *Dombrowski v. Eastland*, the possible reasons for extending the protection of the Clause were essentially the same as those advanced by Senator Gravel in this case, and in all three they were rejected as insufficient to support an extension.

An analysis of the reasons behind the Clause, the degree of immunity necessary for legislative aides, and the strong social interest in full grand jury inquiry into criminal activity confirm the wisdom of this Court's decisions. The main function of the Clause is to protect members from liability arising from speech and debate, and inquiry of aides and private persons does not affect that. Nor does it interfere substantially with the member's work. Although it may conceivably result in some "embarrassment," that is not a sufficient basis for immunity, particularly since members are constantly subject to such embarrassment from private inquiry and criticism. Unlike the member himself, who is responsible to an electorate and can be disciplined by a House of Congress, the aide is subject to neither of these restraints on improper action.

The privilege asserted by Senator Gravel would reach a large number of assistants to members of Congress and might be subject to abuse. It could be asserted in many circumstances in which any interest in protecting the legislative process would be exceedingly remote. We believe that legislative aides do enjoy an immunity from civil liability coextensive with that of officials of the executive branch, cf. *Barr v. Matteo*, 360 U.S. 564. This immunity has been considered sufficient to ensure the proper performance of public responsibilities, and we perceive no basis for granting legislative aides a broader immunity from criminal liability and inquiry. *A fortiori*, no such immunity should be extended to third persons who happen to be dealing with a Congressman or his aides.

II

1. The Speech or Debate Clause protects only "Speech or Debate in either House" and does not provide any immunity for private republication of such speech or debate. The purpose of the Clause is to insure members' freedom of debate. The large number of issues Congress must now consider and the complexity of the problems it faces means that the members must place considerable reliance in performing their legislative functions upon information and discussion in committee reports and, insofar as it records things actually said in either House, upon the Congressional Record. It is presumably for this reason that the Speech or Debate Clause covers these two categories of Congressional documents.

The private republication of the Pentagon Papers was not a part of or necessary to "Speech or Debate in either House" and has no valid relationship to the functioning of Congress in the area of Speech or Debate. It was not intended to aid the members of Congress in performing their legislative duties but to make available to the public information which, as the court of appeals characterized it (Pet. App. 18), came into Senator Gravel's hands "unauthorizedly" but which he believed the general public should see.

The Speech or Debate Clause should not be extended to cover the distribution of protected Speech or Debate through private republication which a member has undertaken without official approval. The Clause does not cover all acts customarily done by a congressman but only those that are a part of Speech or Debate. *United States v. Johnson*, 383 U.S. 169, 172.

2. The English parliamentary privilege, on which the Speech or Debate Clause was based, did not cover republication. From the first case which so held in 1698 until the middle of the 19th century, the privilege did not cover republication of Parliamentary speeches. It was only as a result of an 1840 statute that a privilege was created for the publication of papers pursuant to an order of a House of Parliament. The American authorities, although they are few, similarly reject any privilege for republication of protected Speech or Debate.

3. The court of appeals also ruled that legislative aides have an immunity from testifying before a grand jury about republication by analogy to the absolute

immunity executive officers have for torts committed in the performance of their official duties. Cf. *Barr v. Matteo*, 360 U.S. 564. The latter immunity, however, is solely from liability for damages or perhaps from injunctive relief. It rests upon the policy consideration that, without such immunity, government officials might be deterred by the threat of damage suits from vigorously performing their duties. Legislative aides are unlikely to be similarly deterred because of the possibility that they may have to testify before a grand jury. We know of no case immunizing executive officials from having to appear before a grand jury, and there is no reason why legislative aides should have a greater privilege. Legislative aides, like everyone else, should perform the duty of all citizens to testify before a grand jury about any matter of which they have knowledge.

4. Even if the Speech or Debate Clause or legislative immunity permits a legislative aide to avoid testifying before a grand jury about republication of protected Speech or Debate, that immunity does not extend to third persons whose only possible connection with the legislative process was that they were negotiating for or handling the republication. Those persons were not performing essential aspects of the legislative process on behalf of "Senators or Representatives," so that making the immunity of the latter effective requires that it be extended to the former. Nor is a member of Congress "being questioned" about his "Speech or Debate" when third persons are questioned about their dealings with him or his aide.

ARGUMENT

I

THE SPEECH OR DEBATE CLAUSE DOES NOT LIMIT A GRAND JURY'S INQUIRY OF CONGRESSIONAL AIDES OR THIRD PARTIES

The precise question whether a Senator may invoke the Speech or Debate Clause to foreclose grand jury inquiry of legislative aides, or of third parties who have dealt with the Senator or his aides, has never been decided by this Court; but the language of the Clause, the pre-Constitutional history of parliamentary privilege, the intent of the framers revealed in contemporaneous documents, this Court's decisions with respect to the protection afforded Congressional employees, and a sensitive assessment of the proper needs of members of Congress balanced against society's interest in ascertaining and punishing criminal activity, all indicate that a Senator's immunity from grand jury questioning about activities that may constitute "Speech or Debate" does not extend to persons other than himself.

This does not mean that legislative aides are without the protection of any privilege; we believe that in their legislative work they should enjoy an official immunity as broad as that of responsible executive officials (see *Wheeldin v. Wheeler*, 373 U.S. 647; cf. *Barr v. Mateo*, 360 U.S. 564). This privilege would protect against liability for civil damages arising from their performance of their duties for a legislator. But the protection afforded members of Congress with respect to speech and debate against criminal

liability and inquiry concerning criminal guilt is an extraordinary one not shared by other government officials, except perhaps the President himself; its extension to aides is not required to enable members themselves or their aides properly to perform their duties; and such an extension to bar grand jury inquiry into possible criminal activity would constitute an unwarranted interference with the vital functioning of the grand jury, "a great historic instrument of lay inquiry into criminal wrongdoing" which has long held a central place in "the federal constitutional system" (*United States v. Johnson*, 319 U.S. 503, 512, 513) and which "has a right to every man's evidence" (*Piemonte v. United States*, 367 U.S. 556, 559, n. 2).

A. *The Language of the Clause.* Article I, Section 6 of the Constitution provides:

The Senators and Representatives * * * shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective House, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Though there may be room for argument as to what activities are covered by the phrase "Speech or Debate in either House," the Clause is linguistically precise as to the persons who enjoy its protection: only "The Senators and Representatives." Nonetheless, it is argued that the business of Congress has become much more complex, requiring, as it did not in 1787, profes-

sional assistants to members of Congress, and that the limited language should not preclude extension to those who assist the members in their duties. Even if this argument had force, it would not support the extension of the Clause by the court below to bar inquiry of private third parties. There was as much chance in the late eighteenth century as there is now that a grand jury investigation of possible criminal activity by private persons might include inquiry that would touch peripherally on the "motives or purposes behind the Senator's conduct" (See order of court of appeals, p. 7 *supra*). Had the framers wished to foreclose questioning of anyone about matters touching on a member's speech or debate, they would presumably have chosen language quite different from "The Senators and Representatives * * * shall not be questioned in any other Place."⁵

⁵ The language of the English Bill of Rights of 1689, 1 Wm. & Mary Sess. 2, c. 2, which this Court has recognized several times as an important source for the Speech or Debate Clause (see, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 202; *Tenney v. Brandhove*, 341 U.S. 367, 372; *United States v. Johnson*, 383 U.S. 169, 177-178) is much less precise about the persons to whom it reaches: "That the Freedom of Speech, and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." Similarly, Article V of the Articles of Confederation, an obvious possible model for the writers of the Constitution, is much less specific. It provides:

"Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrest and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, and breach of the peace."

Most of the colonies enacted specific legislation extending the

Nor, with respect to legislative aides, can the limited scope of the constitutional language be explained away by reference to changed legislative practices. Certainly it was contemplated in 1787 that the Houses of Congress would have paid employees—as the Houses of Parliament and the colonial legislatures had for many years—and it was foreseeable that legal actions or inquiries directed at these employees might reflect on the activities of the members. Thus there was a class of persons then for whom the rationale for protection was markedly similar to that advanced now for legislative aides; yet the language was narrowly drawn to reach only Senators and Representatives.

Moreover, as is reflected more fully in the history summarized in the following sections, the framers were aware of arguments that the privilege against harassment through arrest could be made more fully effective if it extended to family members and servants; yet the Clause quite clearly does not give them a privilege from arrest. Thus, the Clause's limitation to Senators and Representatives can not be attributed simply to a lack of foresight concerning the modern roles of legislative aides. The framers made a deliberate choice not to extend the privileges against arrest and guard-

related privilege of freedom from arrest to servants. Clarke, *Parliamentary Privilege in The American Colonies*, 113. Given the availability of the more general and open-ended language concerning speech and debate of the English Bill of Rights and the Articles of Confederation, and the specific colonial coverage of certain nonmembers in the related privilege against arrest, the precise words of the present Clause can hardly be assigned to caprice or inattentive draftsmanship.

ing speech and debate to cover every individual to whom the underlying rationales might conceivably reach. They recognized that extraordinary privileges carry some social cost, and they declined to extend the coverage of the Clause beyond Senators and Representatives, for whom direct protection was most essential.

B. Pre-Constitutional History. The historical development of the English parliamentary privilege for speech and debate (see generally *United States v. Johnson*, 383 U.S. 169, and the brief for the United States in that case (No. 25, October Term 1965, pp. 19-24)) sheds little direct light on its possible applicability to legislative aides, but the history of the cognate privilege from arrest strongly reinforces our view that the framers of our Constitution deliberately decided not to extend either privilege further than to the members themselves.

The privilege of freedom of speech within Parliament developed as an aspect of the "long struggle for parliamentary supremacy" (*United States v. Johnson*, 383 U.S. 169, 178) vis-à-vis the Crown. It was asserted in response to the fear, derived from painful historical precedent, that speeches made in Parliament would be the basis for summary imprisonment or other persecution of a member who offended the King, and for royal intervention into the proceedings of Parliament. A crucial aspect of the privilege was the exclusion of strangers from Parliamentary debates, since strangers might report the words of a member to the King. "So long, therefore, as the Commons were obliged to protect themselves against

the rough hand of the prerogative, they strictly enforced the exclusion of strangers." (1 May, *The Constitutional History of England 1760-1860* (1912 ed.) 327-385). Since the privilege related peculiarly to the protection of members against royal punishment for words that displeased the Crown, there was little or no occasion on which the privilege of freedom of speech might have been asserted on behalf of non-members; and that privilege was not claimed on their behalf.⁶

In contrast to the parliamentary privilege of speech, the cognate privilege against arrest did clearly

⁶ The case of Thomas Haxey (1397) has sometimes been cited as an early assertion of the privilege of freedom of speech, and Haxey may not have been a voting member of Parliament but a representative of the clergy attending Parliament, see Wittke, *The History of English Parliamentary Privilege*, 26 Ohio State Univ. Bull., No. 2, p. 24 (1921). Haxey was charged with treason and convicted for introducing a bill in the House of Commons criticizing expenditures of the royal household. With the accession of Henry IV, Haxey successfully petitioned the King in Parliament to reverse the judgment as being against the law and custom of Parliament. Several commentators have rejected the idea that the petition represented a claim of parliamentary privilege. J. E. Neale in *The Commons' Privilege of Free Speech in Parliament* (Tudor Studies, 1924) 259, in "lay[ing] the ghost of Haxey's case, which has troubled us too long," observed:

"In the first place privilege of free speech covers members alone * * *. Moreover, privilege was never a plea against a charge of treason; and in reality the petition in favour of Haxey was either grounded upon the irregularity of the trial * * * or it was grounded upon the contention that the offence was not treason."

See also Taswell-Langmead, *English Constitutional History* (11th ed., Plucknett, 1960), 175. In any event, even if, contrary to this interpretation, Haxey's case does have some bearing on the Parliamentary privilege of freedom of speech, it seems

apply to certain non-members at some stages of its history, but underwent considerable contraction before the Constitution of this country was adopted, and as indicated above, the language of the Clause in our Constitution respecting both freedom from arrest and freedom of debate represents a deliberate choice for a limited rather than expansive privilege.

The privilege against arrest was first noted in the statute of 5 Henry IV (1403), which provided that members of Parliament and their servants were immune from arrest during the time Parliament was sitting, and shortly before and after.⁷ As the power of Commons grew, however, the scope of this privilege widened. Immunity was extended beyond members and their servants to their family and estates. These extensions led to such abuses that "[p]rivilege thus became a menace to the rights of the individual, who was deprived in this fashion of his ordinary common law remedy" Wittke *op. cit., supra*, 41.

For example, in the name of privilege, members of Commons and their servants were declared to be outside the reach of the common law courts during the

apparent that, whatever his precise formal status, by introducing the bill he functioned much like a member of Commons; and his case has little relevance for those who do not propose legislation, vote, or debate, but instead assist legislators in the performance of their duties.

⁷ See Barrington, *Observation on The More Ancient Statutes* (4th ed. 1775) 375.

As in our Constitution, "treason, felony and surety [breach] of the peace" have always been exceptions to the immunity, May, *Parliamentary Practice* (16th ed. 1957) 68. Generally the immunity was limited to immunity from civil arrest, *Williamson v. United States*, 207 U.S. 425.

time that Parliament was sitting. This led to the sale of "protections" issued under the seal of particular members, providing in effect that named persons were servants of the member and should be free from arrest, imprisonment and molestation during the term of Parliament.⁸ Additionally, using the privilege of its members from civil arrest or molestation, Commons successfully asserted the power to punish trespass on the estates of members, theft of their goods or those of their servants and the arrest of their servants.⁹

After the Restoration, efforts were made to eliminate these abuses. Thus, by 1700, legal actions against members of Parliament and their servants could be brought at almost any time when Parliament was not in session (12. and 13 William III, c. 3). In 1769 the statute of 10 George III, c. 50, removed from servants the protections that they had theretofore enjoyed. That law provided that anyone could commence or prosecute an action or suit against any member of Parliament, his family, or his servants; that a member was not immune from service of process; and that in no way could an action be stayed,

⁸ Thus Wittke, *op. cit.*, *supra*, 41 n. 75 observes: "One writer on this period came to the following conclusion: 'It has to be admitted that for no purpose was parliamentary privilege more valued than for escaping from payment of lawful debts' A. S. Turberville, *The House of Lords in the Reign of William III*, 77 (Oxford Historical and Literary Studies, 1913)."

⁹ See Wittke, *op. cit.*, *supra*, 41-43; Taswell-Langmead, *English Constitutional History* (11 ed. Plucknett, 1960) 321-322, 580-582.

dismissed, or delayed on the basis of a claim of Parliamentary membership. The sole exception there to was provided in Sec. 2:

[T]hat nothing in this Act shall extend to subject the person * * * of any of the [members] * * * to be arrested or imprisoned upon any such suit or proceedings. [Emphasis added.]¹⁰

This provision was enacted eighteen years before our Constitution was adopted, and the framers presumably were aware of the contraction of the privilege against arrest that it represented.

We do not suggest that this pre-Constitutional Eng-

¹⁰ The nature of the problem and the solution afforded by this statute have been noted by an eminent commentator: "Members and their servants had formerly enjoyed immunity from the distress of their goods, and from all civil suits during the periods of privilege. Such monstrous privileges had been flagitiously abused; and few passages in Parliamentary history are more discreditable than the frivolous pretexts under which protections were claimed by members of both Houses, and their servants." 1 May, *The Constitutional History of England* (1912), 358. The same commentator has written:

"By the 10th Geo. III, c. 50, a very important limitation of the freedom of arrest was effected. Down to that time the servants of members had been entitled to all the privileges of their masters [with certain minimal limitations] but by the 3rd section of the 10th Geo. III., the privilege of members to be free from arrest upon all suits, authorized by the Act, was expressly reserved; while no such reservation was introduced in reference to their servants. And thus, without any distinct abrogation of the privilege, it was, in fact, put an end to, as executions were not to be stayed in their favor, and their freedom from arrest was not reserved."

May, *Treatise On The Law, Privileges, Proceedings, And Usage of Parliament* (7th ed. 1873) 130.

lish history"¹¹ is, by itself, dispositive of the issue of the applicability of our Speech or Debate Clause to legislative aides. But, when read in light of the constitutional language and contemporaneous statements, it leaves no doubt that the framers did not inadvertently refer only to Senators and Representatives. They consciously rejected creating a privilege on behalf of other persons whom legislators from time to time might wish to bring within the ambit of their own protection.

C. *The Intent of the Framers.* Since Article I, Section 6 of the Constitution was approved at the Constitutional Convention without discussion (5 *Debates On The Adoption of the Federal Constitution* (Elliot ed. 1845) 378, 406; *United States v. Johnson, supra*, 383 U.S. at 177), its precise boundaries are not marked out by any explicit legislative history. Reference to relatively contemporaneous materials, however, confirms the conclusion drawn from the language itself and the pre-Constitutional development of Parliamentary privilege that a conscious choice was made not to extend the Clause to persons other than the members of Congress themselves.

¹¹ The American Colonial experience in large measure tracked the English background including the protection of servants from arrest. See generally, Clarke, *Parliamentary Privilege in The American Colonies* (1943). This protection was cut back after the federal constitution was adopted until today only Virginia maintains the privilege on behalf of servants. See Va. Code (1950), § 30-4 to § 30-8. For a collection of the relevant state Constitutional provisions see *Tenney v. Brandhove*, 341 U.S. 367, 374-376.

The framers' awareness of the value of uninhibited legislative speech is evidenced by their approval of the Clause,¹² but they were also cognizant of the abuse of parliamentary privilege and they feared legislative excess. Madison cautioned that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *The Federalist* No. 48 (Bourne ed. 1914) 339. He argued that specific barriers should be erected against abuse of power by Congress (*id.* 338-343). In a similar vein, Jefferson wrote to Madison in 1789 that "[t]he tyranny of the legislatures is the most formidable dread at present and will be for long years." *Tenney v. Brandhove*, 341 U.S. 367, 375 n. 4; See also *United States v. Brown*, 381 U.S. 437, 443, 444.

That the limitation, in Art. I Sec. 6, of the freedom from arrest and freedom of speech or debate to "Senators and Representatives" was deliberate is perhaps most clearly indicated in *Thomas Jefferson's Manual of Parliamentary Practice* of 1801. After tracing the growth of English parliamentary privilege "for centuries with a firm and never-yielding pace," he observed (Sec. III) ::

¹² James Wilson stated the purpose of the speech or debate privilege as follows: "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38, quoted in *Tenney v. Brandhove*, 341 U.S. 367, 373.

It was probably from this view of the encroaching character of privilege that the framers of our Constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged "*Senators and Representatives*" themselves from the single act of "arrest in all cases except treason, felony, and breach of the peace, during their attendance at the session of their respective Houses, and in going to and returning from the same and from being questioned in any other place for any speech or debate in either House." [Emphasis added; S. Doc. No. 1, 90th Cong., 1st Sess., pp. 383-384.]

D. *Judicial Decisions On The Meaning of the Speech and Debate Clause.*¹³ The precise questions presented by this case are novel, but this Court has considered the Speech or Debate Clause in other contexts and its decisions strongly support the interpretation of the Clause we urge. It is useful in approach-

¹³ The American case law on the constitutional immunity from arrest does not advance the inquiry because the clause has been involved in little litigation. This is in large measure due to the inherent limitations in the wording of the clause. From the earliest assertions of the privilege, "treason, felony and breach of the peace" were exceptions (see Note 7. *supra*). Essentially the immunity has been merely one from civil arrest (*Williamson v. United States*, 207 U.S. 425). And even in civil cases a Congressman may be served with process (*Long v. Ansell*, 293 U.S. 76). While civil arrest was common in England and in America at the time of the adoption of the Constitution, it is no longer so. Thus, as the court observed in *Long v. Ansell*, 69 F. 2d 386, 388 (C.A. D.C.):

That which at the time of the adoption of the Constitution was of substantial benefit to a Member of Congress has been reduced almost to a nullity.

ing the relatively few decisions of this Court which have involved the Clause to have firmly in mind the central thrust of Senator Gravel's position. It is that if aides do not enjoy a privilege coextensive with that of the members for whom they work, inquiry directed at an aide may serve as a way of questioning the member's conduct and embarrassing him, and as a way of impairing the member's performance of his duties through harassment and possible inhibition of the aide. The crucial point of this discussion is that these same contentions were equally applicable to the related problems with which this Court has dealt, and they have been implicitly rejected as insufficient to sustain extension of the coverage of the Clause to persons other than Senators and Representatives.

In two suits brought to correct erroneous Congressional action in which members of Congress were joined with employees of Congress as defendants, this Court has, while dismissing the suits as to the Congressmen, sustained jurisdiction over the employees and decided the cases on the merits adversely to the Congressional position,

The first of these cases, *Kilbourn v. Thompson*, 103 U.S. 169, was this Court's original opportunity to consider the Speech or Debate Clause. There, a committee of the House had been investigating certain real estate activities and subpoenaed the plaintiff Kilbourn to testify; he refused. The House then ordered him jailed for contempt. After being released on a writ of habeas corpus, Kilbourn filed suit against the committee members and the sergeant-at-arms for false imprisonment. This Court held that although the

Speech or Debate Clause protected the House committee members, the sergeant-at-arms could be held liable. In support of that decision, the Court cited language from *Stockdale v. Hansard*, 9 Ad. & E. 1, 114, 112 Eng. Rep. 1112, 1156 (1839) (see *infra* at p. 48), refusing to extend the parliamentary privilege of freedom of speech to non-members; and this Court observed (103 U.S. at 202):

Taking this to be a sound statement of the legal effect of the [English] Bill of Rights and of the parliamentary law of England, it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source.

In *Powell v. McCormack*, 395 U.S. 486, decided nearly 90 years after *Kilbourn*, this Court, again without dissent on the point, reached the same conclusion that the Clause does not protect Congressional employees.¹⁴ Congressman Powell brought suit against five members of the House, the Speaker, the Clerk and the Doorkeeper seeking an injunction to restrain them from executing a resolution to deprive him of his House seat. While the Court found that the legislators were protected from suit under the Clause, it held that the legislative employees were amenable to judicial action (395 U.S. at 504):

The Court first articulated in *Kilbourn* and followed in *Dombrowski v. Eastland* the doctrine that, although an action against a Congressman may be barred by the Speech or

¹⁴ Mr. Justice Stewart, dissenting, considered the case moot. 395 U.S. at 559.

Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts.¹⁵

In stating the reasons for this difference in treatment, the Court said (395 U.S. at 505-506):

The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the

¹⁵ In *Tenney v. Brandhove*, 341 U.S. 367, 378, in which state legislators were held 'not liable under a federal civil rights statute, the Court had affirmed the vitality of *Kilbourn*.

For a recent lower court case following *Kilbourn* and *Powell*, see *Stamler v. Willis*, 415 F. 2d 1365, in which the Court of Appeals for the Seventh Circuit reversed the dismissal of an action for injunctive and declaratory relief challenging the House Un-American Activities Committee, and remanded to permit the joinder of "appropriate [non-Member] agents of the House Committee" (415 F. 2d at 1368) so that effective relief might be granted if plaintiffs succeeded on the merits. See also *Hentoff v. Ichord*, 318 F. Supp. 1175 (D. D.C.).

United States Servicemen's Fund v. Eastland, Civil No. 1474-70 (D. D.C., decided October 21, 1971) in which the court, in an injunctive action, declined to order a subcommittee's counsel to answer certain questions posed by plaintiff seeking pretrial discovery, is not inconsistent with the basic principle of *Kilbourn* and *Powell*, or the position of the government in this case. The court did refer to a Senate resolution authorizing counsel to testify only as to matters of public record, declaring that there was no authority for the proposition that a "legislative employee's vulnerability to suit requires this Court to afford complete satisfaction of plaintiffs' discovery requests when such discovery is specifically barred by a Senate resolution" (slip op. 4). But the court did not explicitly rest on the Speech or Debate Clause; it did not hold that Congress can immunize employees from all inquiry in civil suits, much less that one member of Congress can immunize his own employee from all inquiry in a criminal investigation.

performance of their legislative tasks by being called into court to defend their actions. A legislator is no more or no less hindered or distracted by litigation against a legislative employee calling into question the employee's affirmative action than he would be by a lawsuit questioning the employee's failure to act. * * * Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves. In *Kilbourn* and *Dombrowski* we thus dismissed the action against members of Congress but did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. * * *

In *Dombrowski v. Eastland*, 387 U.S. 82, decided two years prior to *Powell*, this Court also distinguished the immunity of members of Congress from the possible immunity of those who assist them. That case involved a civil action against the chairman and counsel of the Internal Security Subcommittee of the Judiciary Committee of the Senate who, plaintiffs claimed, had conspired with state officials to seize property and records of petitioners in violation of the Fourth Amendment. The Court, *per curiam*, affirmed the dismissal of the suit against the Senator because the "record does not contain evidence of his involvement in any activity that could result in liability," since "[i]t is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution * * * that legislators engaged 'in the sphere of

legitimate legislative activity' * * * should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." (387 U.S. at 84-85). Nevertheless, the Court held that, as to Mr. Sourwine, counsel for the subcommittee, there was a sufficient factual dispute to warrant a trial, stating:

This Court has held, however, that this doctrine [of legislative immunity] is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves. * * * [387 U.S. at 85].

Although the Court did not say explicitly that the activities of the subcommittee chairman or counsel were within the precise scope of Speech or Debate, the statement that the doctrine of "legislative immunity," which has "its roots * * * in the Speech or Debate Clause," was applicable, though less absolutely, to legislative employees might be taken to imply that the Clause does cover employees.¹⁶ Any pos-

¹⁶ Respondents in *Dombrowski*, in a brief signed by the Solicitor General (No. 118, Oct. Term, 1966), had suggested such coverage. *Doe v. McMillan*, No. 71-1027, C.A. D.C., decided January 20, 1972, petition for certiorari pending, No. 71-6356, does apparently adopt such a construction of the Clause (see slip. op. 17-19). Since the decision in *Doe*, turns substantially on the court's finding that the non-members were, in contrast to the situation in *Kilbourn*, "acting pursuant to valid legislative authorization" (slip. op. at 17), it is unclear what view the court would have taken had their acts been wrongful. In any event, the case involves a civil suit and the result is fully consistent with the interpretation of the Clause urged here, not only because the challenged acts of publishing and distributing the report of a House Committee on the District of Columbia school system was proper, but also because the officials sued

sible doctrinal implications of this kind were put to rest by the subsequent and more extensive opinion in *Powell*, which rejects the assertion that the protections of the Clause reach employees.¹⁷

What *Dombrowski v. Eastland* held, however, remains of great significance for this case. That the subcommittee chairman and the chief counsel to the subcommittee had a close working relationship is revealed by the record in that case and is a matter of common knowledge. Given the undisputed facts in that case (see Statement in Brief for Respondents in *Dombrowski*), it could not be doubted that if the action against Mr. Sourwine for damages and injunctive relief proceeded to trial, not only was it possible that actions authorized by Senator Eastland might be subject to scrutiny, it was virtually inevitable that Mr. Sourwine's contacts with the Senator would become a part of the record. Yet this Court did not, as a consequence, immunize Mr. Sourwine from liability or from describing his own activities, nor did it suggest or even intimate that some areas of relevant questioning might be foreclosed because they might touch on the conduct and motives of Senator Eastland. That

were protected by an official immunity independent of the Speech or Debate Clause (see slip. op. 20-25).

¹⁷ We, of course, agree with the opinion in *Dombrowski v. Eastland* that legislative employees do enjoy immunity, but one that is less absolute than that of legislators. Nor do we question that the presence of the Speech or Debate Clause is relevant to the determination whether legislative employees are privileged; it was also relevant to the determination of immunity of state legislators under the federal civil rights statute in *Tenney v. Brandhove*, 341 U.S. 367. Our submission is that the Clause itself does not confer immunity on employees.

Senator Gravel should not be able to protect Dr. Rodberg and private third parties from grand jury inquiry into possible violations of the criminal law follows *a fortiori* from the Court's refusal to protect against inquiry in the context of a civil suit.

Although this Court has never passed specifically on the relevance of the Clause to inquiry of private persons who have dealings with a member of Congress, it follows that if the Clause cannot be asserted on behalf of employees it is also not applicable to private persons. In *United States v. Johnson*, 337 F. 2d 180, the Fourth Circuit reached just this conclusion. Although it held that a Congressman could not be convicted of a conspiracy involving the making of a speech on the floor of the House, the challenge of Johnson's non-member co-defendants to the conspiracy charge was rejected since "none of the privileges of Article 1, section 6 pertain to the defendants who are not members of Congress * * *" (337 F. 2d at 192).¹⁸

E. *The Degree of Immunity Needed for Effective Functioning of the Legislative Process.* A careful assessment of the reasons behind the Speech or Debate Clause, the competing social interest in full grand jury inquiry into criminal activity, and the degree of immunity necessary for legislative aides and employees to function effectively confirm the wisdom of this Court's holdings in *Kilbourn*, *Powell*, and *Domrowski v. Eastland* and demonstrate the unwar-

¹⁸ This Court, in reviewing the decision, explicitly indicated that it was not passing on this third-party issue. *United States v. Johnson*, 383 U.S. 169, 172-173, n. 3.

ranted expansiveness of the positions urged by Senator Gravel and adopted by the court below in this case.

The history of the parliamentary privilege of freedom of speech shows that the primary purpose it served was to protect against Crown actions, such as summary imprisonment, directed at offending speakers, and there can be little doubt that the main function of the provision that "Senators and Representatives * * * for any Speech or Debate in either House * * * shall not be questioned in any other Place" is to immunize legislators from civil and criminal liability for activities within the scope of the Clause. But the Clause does more than guard against substantive liability. It is designed "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions" (*Powell v. McCormack*, 395 at 505), and it protects them "not only from the consequences of litigation's results but also from the burden of defending themselves" (*Domrowski v. Eastland*, 387 U.S. at 82). It is also possible that the Clause has the effect of reducing the chance that a member of Congress may be embarrassed by inquiry into his activities, although he is, of course, subject to similar embarrassment as a consequence of private inquiry and criticism.

Simply to enumerate the protections of the Speech or Debate privilege is to suggest how attenuated are the arguments for coverage of persons other than members of Congress. The member himself is obviously not directly affected by the possible liability of aides

or private persons. At the most it could be said that liability might make it more difficult for the member to hire and keep effective aides, but that is far removed from the degree of interference caused if the member himself is subject to liability. Similarly, inquiry of aides and private persons does not divert the member from his duties, though the required expenditure of time by an aide may involve a minimal interference with the operations of his office. It is true that embarrassment may conceivably be caused by questions that reveal the "motives or purposes" behind a member's conduct, but that hardly seems a sufficient justification for an absolute bar to such questions, particularly before a grand jury, where the proceedings are secret. In short, the privilege for members themselves is much more crucial for a fearless and independent legislature than any conceivable privilege extended to nonmembers.

We reiterate that the Speech or Debate Clause creates an extraordinary privilege for members of Congress; its protection against criminal liability and inquiry is not shared by executive officials or judges.¹⁹ One reason this expansive protection is tol-

¹⁹ The privilege of executive officers not to give evidence which would jeopardize national security (*United States v. Reynolds*, 345 U.S. 1) or diplomatic relations (*cf. Totten v. United States*, 92 U.S. 105) is strictly "limited by its underlying purpose" (*Halpern v. United States*, 258 F. 2d 36, 44 (C.A. 2)). No executive official is exempt from subpoena. See *e.g. Marbury v. Madison*, 1 Cranch 137, 143-144; *United States v. Burr*, 25 Fed. Cas. 30, 34; *United States v. Smith*, 27 Fed. Cas. 1152; *Thompson v. German Valley R. Co.*, 22 N.J. Eq. 111, 113 (State Governor). If after appearing the executive official asserts the privilege, the court must weigh the claim of

erable is because members of Congress are subject to special kinds of scrutiny. They are responsible to their constituents and subject to continuing criticism, and they may be voted out of office if their official actions are found wanting. Moreover, they are subject to the discipline of their own Houses. "Each House may * * * punish its Members for disorderly Behaviour; and, with the Concurrence of two thirds, expel a Member." (U.S. Const., Art. I, § 5). That aides of individual members are not directly responsible to an electorate and very probably are not subject to Congressional discipline are powerful reasons for not extending to them the unique immunity from criminal liability and inquiry of the Speech or Debate Clause.

This conclusion is further buttressed by a consideration of some of the circumstances in which the position of Senator Gravel and the court below could bar effective grand jury investigation. It could easily prevent discovery of the criminal guilt of private third parties when neither the member nor his aide is even suspected of wrongdoing. Suppose the aide of a Senator opposing legislation is offered forged papers, which the aide is told are genuine, that appear to establish a damaging relationship between some Senators supporting the legislation and companies that would benefit from its passage. After

privilege against the need for the evidence, and assure itself that the claim is made in good faith (*United States v. Reynolds*, *supra*, 345 U.S. at 7-11). No court has recognized for executive officers a privilege such as that claimed by the Senator's aides, to refuse to answer any questions at all concerning their official duties.

the aide has obtained the papers, the Senator makes use of them in a speech against the legislation. Subsequently, the possibility of a forgery comes to light. The holding of the court below would permit the Senator to immunize his aide from answering grand jury questions about any contacts with the producer of the forged papers, since these occurred in the course of the aide's employment.²⁰ Such a result would produce a gross distortion of the Speech or Debate Clause.

Suppose, instead, the aide learns that the papers are forged but is bribed to conceal this knowledge from the Senator. Again, since the Senator is interested in the papers and their receipt relates to the aide's legislative duties, the holding of the court below would immunize the aide from inquiry and liability, at least if the Senator sought such immunization. Yet, to put in the hands of a single Senator the possible criminal liability of an aide performing clearly corrupt and unauthorized acts seems far removed from the constitutional clause.²¹

Nor would the situation be fundamentally different if the Senator himself had conspired with his aide and a private person to produce the forged papers.

²⁰ The court below does not make it clear whether the aide enjoys protection of the Speech or Debate Clause simply because of his status or only because his Senator has intervened on his behalf.

²¹ It is no answer to say that the innocent Senator will have no reason to protect guilty third parties or aides. He may well not wish it to be established that he used forged papers, even innocently, and he might also fear that any branding of his aide as a criminal may reflect unfavorably on him.

His own privilege of freedom from criminal liability and inquiry is sufficient to protect the proper functioning of the legislative process; it should not be extended to all those caught up in the criminal enterprise. See *United States v. Johnson*, 337 F. 2d 180, 192 (C.A. 4), affirmed on another issue, 383 U.S. 169.

Senator Gravel's argument does not involve merely a modest extension of the Clause to a relatively few individuals. Many Senators and Congressmen have very sizeable staffs in which a substantial number of aides are doing work arguably related to speech or debate. It would be extraordinarily difficult to differentiate persons on committee staffs who work closely with particular members, and may even function like personal aides in some contexts, from those who are formally part of a member's staff. Neither the court below nor Senator Gravel attempts to draw distinctions based upon the peculiar position of trust a particular aide may occupy or upon the special importance to the legislative process of a particular kind of work related to speech or debate. We, too, doubt the viability of any line based on such distinctions; but for us that merely reinforces the soundness of the principle that only members themselves enjoy the unique protections of the Speech or Debate Clause.

Moreover, the sweeping privilege here asserted might be abused by members to protect those not closely related to their functioning. That possibility is suggested not only by the English history regarding the Parliamentary privilege against arrest, but also by

the fact in this case that Senator Gravel hired Dr. Rodberg on the day he made public the Pentagon Papers.

We believe that legislative aides enjoy a substantial immunity from damage suits, but we find no persuasive reason why it is required for the effective performance of Congress that those attached to members be extended an immunity that is unparalleled in the coordinate branches. This Court early held that judicial officers are immune from actions for civil damages caused by their judicial acts, *Bradley v. Fisher*, 13 Wall. 335, and more recently has ruled that officials of the executive branch of government are likewise absolutely immune from civil damage claims for "action * * * taken * * * within the outer perimeter of [the] line of duty," *Barr v. Matteo, supra*, 360 U.S. 564, 575. It has never been suggested, however, that executive officials or judicial officers need be wholly free from criminal liability or from responding to grand jury inquiries about all matters relating to their employment. We agree with this Court's suggestion, *Wheeldin v. Wheeler*, 373 U.S. 647, 650, 651, that legislative aides may enjoy an immunity from damage suits like that of executive officials. That immunity has been deemed a sufficient protection for the exercise of the duties of executive and judicial officers and we perceive no special justification for granting a special immunity against grand jury inquiry and criminal liability to legislative aides (see discussion, *infra*, pp. 51-54).

Thus a consideration of the possible need for immunity indicates—what the language and history of

the Clause and its judicial interpretation show—that legislative aides and private persons are not, and should not be, protected by the Clause from legitimate grand jury inquiry into possible criminal acts.

II

THE SPEECH OR DEBATE CLAUSE DOES NOT COVER PRIVATE REPUBLICATION OF PROTECTED SPEECH OR DEBATE

The Speech or Debate Clause protects only "Speech or Debate in either House." It does not provide any immunity for private republication of such Speech or Debate. The Clause in terms does not extend beyond the making of a speech or the engaging in debate by a member within the confines of the Houses of Congress themselves; it provides only that *members* cannot be questioned elsewhere "for" any Speech or Debate in either House. There is nothing in the Clause that supports Senator Gravel's contention that the Clause also protects the private republication by non-government agencies of a member's Speech or Debate, and the court of appeals correctly rejected it.

That private republication is beyond the scope of the Speech or Debate Clause is shown by the following considerations: (1) Such immunity is unnecessary to the proper performance of the duties of members of Congress. (2) the English parliamentary privilege, from which the Speech or Debate Clause was drawn, does not cover republication. (3) The American authorities similarly have not so extended the Clause. (4) Any legislative privilege which may

exist - for congressional aides protects them only against tort liability and perhaps against injunctive relief; it does not immunize them from either criminal prosecution or testifying before a grand jury. (5) Finally, any possible privilege that congressional aides might have against giving grand jury testimony with respect to private republication of protected Speech or Debate does not extend to third persons who participate in the republication, such as the representatives of the publishing firms with whom Senator Gravel or his aides negotiated for republication.

A. *Republication is Not Protected "Speech or Debate" Under the Clause.* The purpose of the Speech or Debate Clause, as developed in Point I above, is to give the members of Congress sufficient protection against liability for or questioning about certain of their legislative actions to insure that the threat or possibility thereof will not impede or inhibit them in the performance of their official duties. The Clause protects the members "for what they do or say in legislative proceedings," since "the legislature must be free to speak and act without fear of criminal and civil liability" (*Tenney v. Brandhove*, 341 U.S. 367, 372, 375). The immunity, however, does not cover everything done by a member in the performance of his legislative function; it covers only "Speech or Debate in either House." As the court of appeals recognized in this case (Pet. App. 23), the Clause "is intended to ensure freedom of debate"; cf. *United States v. Johnson*, 383 U.S. 169, 180-182.

Adequate debate on and informed consideration of pending legislation, as well as proper oversight of existing statutes, requires an informed legislature. The volume of business that Congress now transacts—involving a vast number of different subjects and increasingly complex and difficult problems—makes it impossible for each member to acquire personal knowledge of every aspect of every pending issue. Individual members necessarily must therefore rely to a great extent upon the hearings and reports of the committees which handle Congressional business in its early stages, and upon the debates on the floors of Congress.

Keeping the members of Congress informed about what happens in committees and on the floor thus is necessary to effective "Speech or Debate." It is presumably for this reason that, as the court of appeals noted (Pet. App. 22), the Clause has been interpreted as covering not only legislative speech and debate, but also the contents of committee reports "addressed to Congress." Presumably, the Clause also would cover the contents of the Congressional Record, at least insofar as it records things actually said in either House. See *McGovern v. Martz*, 182 F. Supp. 343, 347 (D. D.C.). It is appropriate that the Clause cover these two categories of Congressional publications because they are the means Congress has selected for informing its membership about its business.

But the private republication of the Pentagon Papers by the Beacon Press, pursuant to arrangements involving Senator Gravel and Dr. Rodberg,

was not a part of or necessary to "Speech or Debate in either House." It involved no supplying to the members of Congress of information that they needed in performing their legislative duties. The contents did not relate to any pending Congressional business. The material was neither the product of a Congressional hearing, nor something supplied to Congress to be considered in connection with pending legislative business.

To the contrary, it was highly classified material which had been prepared by the Department of Defense for the executive branch of the government and which, as the court of appeals characterized it (Pet. App. 18), came into Senator Gravel's hands "unauthorizedly." Even its initial publication at the late evening hearing of Senator Gravel's subcommittee could hardly be said to have had any demonstrable relationship to the need of members of Congress for information related to pending legislative matters. Indeed, copies of the study had previously been supplied to the Congress under conditions that would give the membership access to the material while at the same time protecting its security classification.²²

But, however one may characterize the propriety of Senator Gravel's initial publication of this material, the subsequent private republication cannot be viewed

²² The conditions under which the material was supplied to Congress are stated in an affidavit of J. Fred Buzhardt, General Counsel of the Department of Defense and the attachments thereto. The affidavit was filed in the cases of *Moss v. Laird*, and *Fisher v. Department of Defense*, D.D.C., Civil Actions No. 1254-71 and 1865-71, and is reprinted in the appendix to this brief.

as having any valid relationship to the functioning of the Congress in the area of speech or debate. The republication by the Beacon Press, for general sale to the public, was not a part of and had no connection with any Congressional speech or debate, either on the floor of Congress or in committee. See *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180-1181 (D. D.C.). It was intended not to aid the members of Congress in performing their legislative duties, but to make available to the public information which had come into Senator Gravel's hands and which he believed the general public should see.

The Chairman of the Senate Public Works Committee, to whom Senator Gravel, as chairman of the subcommittee, was responsible, apparently recognized that the republication was not necessary or appropriate to the proper performance of any legislative function, since he refused to authorize it.^{22a}

Indeed, Senator Gravel makes no attempt to show that the republication of the Pentagon Papers had any meaningful relationship to the proper performance of the Speech or Debate function of Congress. Rather, his argument is that members of Congress have a duty to inform "the electorate about acts committed by the Executive and, specifically, with respect to Executive conduct in foreign relations" (Pet. No. 71-1017, p. 7); that the republication was a proper step in the performance of that duty; and that the Speech or Debate Clause broadly covers all aspects of this Congressional "informing function" (*id.*, p. 8).

^{22a} Transcript of Proceeding, September 10, 1971 (Dr. Rodberg's Motion to Quash Grand Jury Subpena), p. 52.

The claim is a sweeping one. Senator Gravel does not argue that the material he was seeking to distribute through the republication was designed primarily to inform his own constituents or to tell them about his own actions. Instead, he asserts a right to "inform [the] electorate" generally about "Executive conduct in foreign relations." Indeed, Senator Gravel invites this Court to extend the Speech or Debate Clause to all things "generally done" by legislators (Pet. No. 71-1017; p. 7).

But, as the court of appeals pointed out: "Our courts have expanded the privilege beyond the act of debating within Congress a proposal before it only when necessary to prevent indirect impairment of such deliberation" (Pet. App. 26). For example, it may be part of a Congressman's contemporary role to intercede with executive agencies on behalf of constituents; yet this Court has stated:

No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process. * * *

[*United States v. Johnson*, 383 U.S. 169, 172]²³

In contrasting intercession with executive agencies with "the due functioning of the legislative process," the Court—consistent with all prior interpretations of the Clause—was limiting its operation to conduct

²³ The Court could not have been referring to corrupt or improperly motivated intercessions only, since, if intercessions are Speech or Debate, they would be protected, whether they are innocent or corrupt, *United States v. Johnson*, *supra*.

reasonably related to the law-making function of Congress.

Similarly, the fact that Congressmen customarily communicate with their constituents should not place such communication beyond scrutiny. It is not so closely related to "the due functioning of the legislative process" as to warrant constitutional immunity from "question[ing] * * * in any other Place."

Moreover, the republication here involved was not directed to Senator Gravel's constituents, but to the public generally. It was not authorized by either the chairman of the full Committee or by the Senate itself. Where the House or Senate approves republication of Committee reports or documents, as it sometimes does (cf. *e.g.*, *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C.)), that approval at least reflects the view of the Chamber that it is an appropriate part of the legislative process to make further distribution of the material. The situation is quite different, however, when an individual member himself arranges for republication.

The provision of adequate information to the public could be adequately assured by giving legislative aides immunity from tort liability for republication of protected Speech or Debate—although such a privilege has not been generally recognized (see *infra*, pp. 49-51).

B. The English Parliamentary Privilege, on Which the Speech or Debate Clause is Based, did not Cover Republication.

As this Court has noted (*Tenney v. Brandhove*, 341 U.S. 367, 372-375; *United States v. Johnson*, 383 U.S. 169, 177-179), the Speech or Debate Clause was de-

rived from and parallels the English Bill of Rights of 1689 (1 Wm. & Mary, Sess. 2; c. 2), which itself "was the culmination of a long struggle for parliamentary supremacy" (*Johnson, supra*, 383 U.S. at 178; see Point I, *supra*). Here again, in determining the scope of the Clause, it is appropriate to consider that history and the British decisions interpreting the comparable immunity, which the Bill of Rights gave for "Freedom of Speech, and Debates or Proceedings in Parliament." That history and those cases indicate, as the court of appeals held, that the members' privilege of speech did not cover "privately published reproductions of their parliamentary speeches" (Pet. App. 26).

Commons' claim of the privilege of freedom of speech arose as a response to claims of the Crown that such speech violated royal prerogative (See Brief for the United States, *United States v. Johnson*, No. 25, October Term 1965, pp. 19-24). In this context Commons sought privacy of debate, not publicity. We have already noted the Commons' assertion of the right to exclude strangers (who might be spies for the King) from debates (*supra*, p. 17-18). In 1628 and again in 1640 the clerk was forbidden to make notes of speeches or to "suffer copies to go forth of any argument or speech whatsoever"; and in 1641 Commons ordered "That no Member shall either give a copy, or publish in print anything that he shall speak here, without leave of the House" (May, *Parliamentary Practice*, (16th ed., 1957) 55). Repeated orders of the House forbidding publication of debates have never been rescinded, although they have fallen into disuse,

and, since 1909, there has been an official report of debates (*ibid.*).

It is thus hardly surprising that the privilege of freedom of debate has never been thought by English courts to include republication. The first case dealing with republication was *Rex v. Williams*, 2 Show. K.B. 471, 89 Eng. Rep. 1048, decided in 1688. In that case the Speaker of the House of Commons was criminally prosecuted and fined 10,000 pounds for publishing a libel. His defense was that the publication was done in his official capacity and pursuant to order of the House. The court rejected this defense, ruling that an order of the House could not "justify the scandalous, infamous, flagitious libel."

In *Rex v. Lord Abingdon*, decided in 1795, 1 Esp. N.P. Cas. 228, a member of the House of Lords was criminally prosecuted for privately republishing a libelous speech he had delivered on the floor of the House. His defense was that he had a right to print and publish what he had a right to deliver; the court ruled that his privilege to deliver the speech did not extend to private republication for his personal purposes. The result in *Abingdon* was foreshadowed by the earlier decision in *Williams*, since if even official republication directed by the House was not privileged, *a fortiori* private personal republication was not protected.

Thus, at the time the Constitution was drafted, the law in England was that any parliamentary privilege covering speech and debate on the floor did not extend to republication.

Senator Gravel argues (Pet. No. 1077, 15), however, that the "underpinning" of these and other early decisions "has been repudiated" and "their holding has not survived," and that at least since *Wason v. Walter*, L.R. 14 Q.B. 73 (1868), "the settled law in England is that the Parliamentary privilege protects a member who publishes a speech 'for the information of his constituents,' and that the privilege applies derivatively to the publisher." Although certain republications of Parliamentary debate are now privileged, that was the result not of any judicial decision repudiating the earlier cases but of (1) a statute and (2) a recognition of a newspaper's privilege fairly and accurately to report parliamentary proceedings.

The statute was the Parliamentary Papers Act of 1840, 3 and 4 Vict. c. 9.²⁴ It was the reaction of Parliament to the decision three years before in *Stockdale v. Hansard*, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (K.B.), which had unequivocally denied a privilege for republication. In that case a publisher sued the public printer for damages based on a defamatory statement contained in a committee report on English prisons that the House of Commons had ordered printed. In an historic opinion that has been described as the final decision rejecting the claim of Parliament to a broad privilege for republication,²⁵ the court permitted recovery. It stated:

²⁴ Under this statute, all criminal and civil proceedings against persons for publication of papers printed by order of a house of Parliament were stayed upon the filing of an affidavit reciting such order. See *Wittke, op. cit., supra*, 155.

²⁵ May, *Parliamentary Practice* (16th ed., 1957) 58.

For speeches made in Parliament * * * that member enjoys complete impunity * * *. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the Speaker, by authority of the House, order an illegal Act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles' warrant for levying ship-money could justify his revenue officer. [9 Ad. & E. at 114, 112 Eng. Rep. at 1156.]

In *Wason v. Walter*, L.R. 4 Q.B. 73. (1868), which Senator Gravel views as having "repudiated" the earlier decisions, the court held that an action for libel could not be grounded upon a newspaper's republication of a defamatory speech made on the floor. The ground of decision, however, was not that the Parliamentary privilege extended to republication, but that the republication was privileged by analogy to the rule protecting a newspaper's fair and accurate reporting of court proceedings. Indeed, the court in *Wason* pointed out that *Stockdale* had correctly rejected the claim that Parliamentary privilege covered republication. It stated (L.R. 4 Q.B. at 86-87):

From the doctrines involved in this defence, namely, that the House of Commons could by their order authorize the violation of private rights, and, by declaring the power thus exercised to be a matter of privilege, preclude a court of law from inquiring into the existence of the privilege,—doctrines which would have placed the rights and liberties of the subject

at the mercy of a single branch of the legislature,—Lord Denman and his colleagues, in a series of masterly judgments which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold.

To the decision of this Court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The position, that an order of the House of Commons cannot render lawful that which is contrary to law, still less than a resolution of the House can supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House or protected by the assertion of its privilege, but whether it is, independently of such order or assertion of privilege, in itself privileged and lawful.

C. The American Authorities Indicate That the Clause Does Not Cover Republication.

The American authorities, though they are scant, are in accord with the British decisions that the legislative privilege for speech and debate does not extend to republication. Thomas Jefferson recognized that the Speech or Debate Clause applies only "to things done in the House in a Parliamentary course. * * * For [a Member] is not to have a privilege *contra morem parliamentarium*

to exceed the bounds and limits of his place and duty" (Jefferson, *Manual of Parliamentary Practice*, in S. Doc. No. 1, 90th Cong., 1st Sess., p. 388).

In his Commentaries on the Constitution, Justice Story noted that the Speech or Debate Clause was intended to provide the same privilege that Parliament had, and that

This privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place (a) and limits of duty. Therefore, although a speech delivered in the House of Commons is privileged, and the member cannot be questioned respecting it elsewhere, yet, if he publishes his speech, and it contains libelous matter, he is liable to an action and prosecution therefor * * * [Story, Commentaries, pp. 630-631].

McGovern v. Martz, 182 F. Supp. 343 (D.D.C.), involved claims for libel based, among other things, upon private printing and circulation of excerpts from the Congressional Record. The court held that although an absolute privilege covers material in the Record, there is only a qualified privilege for republication of the Record. It stated (p. 347):

But what of republication? Should an absolute privilege exist to bar suits for defamation resulting from a Congressman's circulation of reprints or copies of the Congressional Record to non-Congressmen? The reason for the rule—complete and uninhibited discussion among [legislators] is not here served. Accordingly, the absolute privilege to inform a fellow leg-

islator (either by way of speech on the floor or writings inserted in the Record) becomes a qualified privilege for the republication of the information.

See, also, *Long v. Ansell*, 69 F. 2d 386, 389 (C.A. D.C.), affirmed, 293 U.S. 76 (libel action based on printing and distributing copies of the Congressional Record containing reports of an allegedly libelous speech made on the floor of the Senate; "While the published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate, but in the publication and circularizing of the libelous documents"); *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180-1181 (D. D.C.) (the "further printing and public distribution [of a committee report] is not necessary to give effect to the freedom of Congressmen to speak and debate on and off the floor. The Speech or Debate Clause does not necessarily bar an action to enjoin the Public Printer from printing a committee report for public distribution").²⁶

D. Any Legislative Privilege That Congressional Aides Have Immunizes Them Only From Tort Liability and Perhaps Injunctive Relief, but not from Testifying Before a Grand Jury.

²⁶ *Methodist Foundation for Social Action v. Eastland*, 141 F. Supp. 731 (D. D.C.), upon which Senator Gravel relies (Pet. No. 1017, pp. 14, 16), involved an attempt to enjoin the printing as a Senate document of a subcommittee document whose printing the Senate had authorized. The court ruled (p. 731) that "nothing authorizes anyone to prevent Congress from publishing any statement"; it decided nothing on whether the Speech or Debate Clause covers republication.

The court of appeals ruled (Pet. App. 28) that, by analogy to the absolute immunity executive officers have for torts committed in the performance of their official duties (*Barr v. Matteo*, 360 U.S. 564), a member of Congress "may not be questioned at all as to republication," and that his aides enjoy a similar immunity.²⁷

The conclusion the court drew from the analogy is unsound. *Barr v. Matteo* dealt solely with the tort liability of government officers, and the policy reasons upon which that immunity rests do not justify extending it to grand jury testimony. To the contrary, such an extension of the doctrines of official or legislative immunity would be inconsistent with the well-recognized "duty" of "[e]very citizen," including members of Congress and their aides, "of giving testimony to aid in the enforcement of the law" (*Piemonte v. United States*, 367 U.S. 556, 559, n. 2). To our knowledge, the doctrine never has been applied to bar a grand jury from questioning government officers. Its sole office has been to confer immunity from tort or (perhaps) from injunctive liability.

Suppose, for example, that a grand jury had been investigating the terminal leave payments to which the libel in *Barr v. Matteo* related, to determine whether they constituted a crime. Although Mr. Barr,

²⁷ Although the court's ruling on legislative privilege in terms covered only Senator Gravel, the extension of such immunity by implication to his aide seems the only basis for the court's prohibition against questioning Dr. Rodberg about the republication of the Pentagon Papers, in view of the court's holding that the Speech or Debate Clause does not cover republication.

the Acting Director of the government agency involved, was not civilly liable for the libelous press release he issued, he surely could not refuse to testify before the grand jury about the incident. The reason lies in the purpose of the immunity from tort liability recognized in *Barr*.

The immunity involved in *Barr v. Matteo*—and in the many similar decisions that preceded and have followed it—provides “a defense by officers of government to civil damage suits for defamation and kindred torts” (360 U.S. at 569; *id.*, p. 565). Its rationale is that it is “important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government” (p. 571). See, also, *Gregoire v. Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949.

There is no comparable policy justification for giving Congressional aides immunity from testifying before a grand jury. It is neither necessary nor desirable in order to encourage them to perform their duties properly. The possibility of being summoned by a grand jury, unlike the threat of personal tort liability, is unlikely to deter a legislative aide from performing his tasks vigorously and unhesitatingly. Nor is it likely that legislative aides would be called before grand juries with such frequency that it would im-

pose unjustified demands upon their time; the situation would be different, however, if damage suits were permitted against government officers for alleged torts committed as part of their duties. Finally, the public interest in obtaining grand jury testimony of all persons who have knowledge of matters that the grand jury is investigating, whatever their official position, which supports the claim here, is weightier than the private interest of persons seeking financial redress for torts that government officers allegedly committed against them.

Although this Court has long recognized the immunity of members of the judicial and executive branches of the government from tort liability for official acts (*Bradley v. Fischer*, *supra*, 13 Wall. 335 (judge); *Spalding v. Vilas*, 161 U.S. 483 (Postmaster General)); we know of no case in which the immunity has been extended to excuse them from testifying before a grand jury. There is no reason why a different rule should be created for employees of the legislative branches, for whom this Court only recently suggested there may be a similar immunity from tort and injunctive liability (see *Wheeldin v. Wheeler*, *supra*, 373 U.S. 647; *Dombrowski v. Eastland*, *supra*, 387 U.S. 82).

In sum, there is no sound reason to create an immunity apart from the Speech or Debate Clause that would permit employees of the legislative branch to avoid the normal duty of all citizens to testify before the grand jury about any matter of which they have knowledge.

E. Any Possible Privilege That Legislative Aides Might Have not to Give Grand Jury Testimony About Republication of Protected Speech or Debate Does not Extend to Third Persons who Participate in Such Republication.

Even if, contrary to our submission, either the Speech or Debate Clause or a legislative immunity permits legislative aides to avoid testifying before a grand jury about republication of protected speech or debate, the immunity does not extend to third persons whose only possible connection with the legislative process is that they were negotiating for or handling the republication.

The language of the Clause, no matter how broadly it is construed, cannot fairly be read to cover such third persons. Those persons are not performing essential aspects of the legislative process on behalf of "Senators or Representatives," so that making the immunity of the latter effective requires that it be extended to the former. Neither Mr. Webber, the editor of the Massachusetts Institute of Technology Press with whom Senator Gravel or Dr. Rodberg had unsuccessful negotiations, nor officials of the Beacon Press, which ultimately handled the republication, were performing or effectuating the performance of any legislative function in their negotiations for the republication. Rather they were merely carrying on the private business of their own publishing organizations. Their activities were neither Congressional "Speech or Debate," nor a part of the legislative process.

Nor can it be said that Senator Gravel is "being questioned" when third persons are questioned about their dealings with him or his aide. The questioning that the Clause prohibits is questioning of the Senator or Representative, not questioning of other persons about their dealings with him.

The extension of immunity to such third persons is not necessary to make the Speech or Debate Clause privilege effective. It is far fetched to suggest that a member of Congress is likely to be deterred from doing his job properly because of the possibility that some third person with whom he has contact may be questioned by a grand jury about the matter.

If, as the court of appeals held in the *Johnson* case, 337 F. 2d 180 (C.A. 4), third persons may be criminally prosecuted for their dealing with a Congressman involving the performance of his legislative function, *a fortiori* they may be required to testify before a grand jury about such dealings.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it permits inquiry of Dr. Rodberg, and of private persons who have dealt with Senator Gravel or his aides. The judgment should be reversed

insofar as it restricts the questions that may be asked of Dr. Rodberg and other witnesses.

Respectfully submitted.

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Solicitor General.

ROBERT C. MARDIAN,
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Attorneys.

APRIL 1972.

APPENDIX

United States District Court for the
District of Columbia

Civil Action No. 1254-71

JOHN E. MOSS, OGDEN R. REID, PLAINTIFFS

v.

MELVIN R. LAIRD, SECRETARY, DEPARTMENT OF
DEFENSE, DEFENDANT

Civil Action No. 1865-71

PAUL FISHER, DIRECTOR, FREEDOM OF
INFORMATION CENTER, PLAINTIFF

v.

DEPARTMENT OF DEFENSE; MELVIN R. LAIRD,
SECRETARY, DEPARTMENT OF DEFENSE, DEFENDANTS

AFFIDAVIT OF J. FRED BUZHARDT, GENERAL COUNSEL,
DEPARTMENT OF DEFENSE

STATE OF VIRGINIA, County of Arlington, ss.:

J. Fred Buzhardt, being duly sworn, deposes and
says:

1. I am the General Counsel of the Department of
Defense and have personal knowledge of the matters
related herein. The Secretary of Defense delegated
to me full responsibility for determining whether
portions of the 47 volumes entitled "United States-
Vietnam Relations, 1945-1967" hereafter referred to
as "the Study," could be declassified without damage
to the national defense or foreign policy. It is pur-

suant to this authority that I have reviewed the Study and have made the determination that materials deleted in the Government's declassified version of the Study remain classified in the interest of the national defense/or foreign policy.

2. Numerous Top Secret-Sensitive documents from the Department of Defense, the State Department, and United States intelligence agencies were utilized in preparation of the Study. After significant portions of the material in the 47-volume Study were published without authorization, Secretary of Defense, Melvin R. Laird, directed that a security review be made of the entire 47-volume Study to determine how much of it could be made available for public dissemination, consistent with the interest of national security and the conduct of foreign affairs.

3. Independent of this directive, the Secretary, by letters to the Speaker of the House of Representatives and to the President of the Senate, dated June 28, 1971, forwarded copies of the complete Study for the use of those Congressmen and Senators who desired to have access to this information. Mr. Laird's letter (a copy attached) stated that the Study remains classified Top Secret-Sensitive and "... is delivered in accordance with our understandings as to the special security measures to be taken by you to protect those materials in the volumes, the disclosure of which could have a grave and immediate danger to the national security." (Copy of Check List attached.)

4. By letter, dated September 20, 1971, to the Honorable F. Edward Hébert, Chairman, Armed Services Committee, House of Representatives, Mr. Rady A. Johnson, Assistant to the Secretary of Defense, transmitted to Mr. Hébert a declassified version of the Study (copy attached). I hereby confirm all of the statements contained in said letter and incorporated

by reference as though fully set forth herein all relevant matters therein contained.

5. In the 43-volume set which was made available to the public through the Government Printing Office on September 20, 1971, certain pages, paragraphs, and footnotes have been deleted. The aforementioned pages and paragraphs were deleted in accordance with the standards and criteria of Executive Order 10501. Approximately two percent of the total narrative material contained in the 43 volumes have been deleted. The deletions, made after an extensive review, fall within four areas of sensitivity:

(1) Information concerning the United States military plans, principally those of the Joint Chiefs of Staff, the Pacific Command, and the Military Assistance Command, Vietnam, as well as other U.S. planning, the public disclosure of which could cause serious damage to the defense interests of the United States. Disclosure of the plans gives exact knowledge to military planners of hostile countries as to what the U.S. will or will not do in response to actions taken against either the U.S. or countries friendly to it, such as Thailand.

(2) Information concerning joint planning of defense arrangements by the U.S. with other countries, principally SEATO members, and bilateral defense arrangements between these countries not involving the U.S., the public disclosure of which could do serious damage to the defense interests of United States allies. Basic concepts outlined, for example, in the 1961 SEATO Contingency Plans are still valid in the current updated versions of these plans.

(3) Information concerning United States diplomatic negotiations with high-level officials of other countries, notably South Vietnam and Laos, the public disclosure of which could do serious damage by

jeopardizing the international relations of the United States. Publicly revealing secret U.S. assessments of Southeast Asian government leaders—outlining their attitudes to the USSR, SEATO, and the U.S. and reflecting, in turn, the degree of U.S. trust in them—could make impossible or seriously handicap, for example, continued U.S. negotiations with these leaders.

(4) Information derived from United States intelligence, or descriptive of United States intelligence activities, the public disclosure of which could do serious damage to the defense interests of the United States. Upon learning of successful U.S. intelligence operations and discovering thereby the sophistication level (for example, in electronic applications) the U.S. has reached in collecting intelligence, hostile countries could undertake measures to prevent U.S. intelligence collection.

6. Since the publication by the Government Printing Office of the 43 volumes, I have reviewed again, the deleted pages and paragraphs, and have concluded that it remain in the interest of the national defense and the conduct of foreign policy that these deletions should not appear in publications available to the public at this time.

7. I have also reviewed again the four volumes which have not been made public and which deal exclusively with sensitive negotiations involving North Vietnam and employing the good offices of other governments in seeking peace and the release of prisoners of war. I have concluded that consistent with the interests of the national defense and the conduct of foreign policy of the United States that these last four volumes should not be made public. Much of the material contained in the four volumes could, if disclosed, result in serious damage to the Nation by jeopardizing the international relations of the United

States. Other documents in the four volumes, if made publicly available, would cause the compromise of intelligence operations vital to the national defense and thereby cause exceptionally grave damage to the Nation.

8. In order to avoid delay in the declassification of the 43 volumes published by the Government Printing Office, all footnotes were deleted. Many of these footnotes referred to highly classified documents not published as such in the 43 volumes. To determine the significance of each of the footnotes would have entailed a careful and time-consuming analysis. The footnotes themselves are now being reviewed to determine which of them may be released for publication and which must be withheld in the interest of national security or foreign policy considerations. Upon completion of this work, the Department of Defense will make available to the public the footnotes in the 43 volumes which do not require protection in the national interest.

9. It is my considered judgment based upon my personal examination that it would be prejudicial to the national defense and foreign policy interest of the United States to make public, at this time, any material from the Study not contained in the Government Printing Office publication. The Secretary and Deputy Secretary of Defense affirm my conclusions in this respect.

10. Publication of the declassified version of the Study by the Government Printing Office has made available to the plaintiffs and the public all of the material in that Study which should properly be made public at this time, in accordance with the intention of the Congress in enacting the Freedom of Information Act. Those portions withheld from the public are expressly excluded from publication and disclosure by the provisions of section 552(b)(1) of title 5 USC,

which exempts from disclosure those matters "specifically required by Executive order to be kept Secret in the interest of the national defense or foreign policy."

J. FRED BUZHARDT.

STATE OF VIRGINIA,
County of Arlington, ss.

Subscribed and sworn to before me, a Notary Public for the County of Arlington, State of Virginia, this 26th day of November, 1971.

[illegible]
Notary Public.

My commission expires July 31, 1973.

THE SECRETARY OF DEFENSE,
Washington, D.C., June 28, 1971.

HON. CARL ALBERT,
Speaker, House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Pursuant to the decision by the President and our subsequent discussion and arrangements, I am having delivered herewith the 47-volume study entitled: "United States Vietnam Relations; 1945-1967."

The study remains classified TOP SECRET-SENSITIVE and is delivered in accordance with our understandings as to the special security measures which will be taken by you to protect those materials in the volumes, the disclosure of which could have a grave and immediate danger to the national security.

As you are aware, an intensive review of the study is now in process for the purpose of declassifying as much of the material as possible consistent with the interest of national security and in consideration of the widespread unauthorized disclosures by the news-

papers in recent days. Every effort is being made to expedite this review and we anticipate that a large portion of the documents will be declassified pursuant to these guidelines.

I have been informed by my security people that they have provided you with the assistance and information you needed to ensure that only members of your body will be permitted access to the documents and that they are controlled and protected as required by law or regulation.

A copy of the study is being delivered simultaneously to the President Pro Tempore of the Senate.

Sincerely,

MELVIN R. LAIRD.

THE SECRETARY OF DEFENSE,
Washington, D.C., June 28, 1971.

Hon. ALLEN J. ELLENDER,
President Pro Tempore,
U.S. Senate,
Washington, D.C.

DEAR SENATOR ELLENDER: Pursuant to the decision by the President and our subsequent discussion and arrangements, I am having delivered herewith the 47-volume study entitled: "United States Vietnam Relations, 1945-1967."

The study remains classified TOP SECRET-SENSITIVE and is delivered in accordance with our understandings as to the special security measures which will be taken by you to protect those materials in the volumes, the disclosure of which could have a grave and immediate danger to the national security.

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I have been informed by my security people that they have provided you with the assistance and information you needed to ensure that only members of your body will be permitted access to the documents and that they are controlled and protected as required by law or regulation.

A copy of the study is being delivered simultaneously to the Speaker of the House.

Sincerely,

MELVIN R. LAIRD.

CHECKLIST

Only Members of the Congress will have access to the Study.

The Study will be controlled by and in the custody of the House Armed Services Committee for the House of Representatives. Classified storage containers, access list forms, Top Secret Information cover sheets and document control forms will be furnished by the Department of Defense for this purpose.

A complete document inventory will be conducted at the close of business each day.

The Study may not be taken from the reading room designated by the House Armed Services Committee. A Committee representative or a Capitol police officer will be present when the Study is not physically locked in the classified storage container.

Access lists will be maintained showing the time of arrival and departure of all persons entering and leaving the reading room, including Capitol police.

The Congressional Members reading the Study will annotate the Top Secret Information cover sheet attached to each document indicating name, date, and the portions of the document read.

The Study contains information respecting the national defense within the meaning of Title 18, United States Code, and the Internal Security Act of 1950, as amended. No notes, reproductions, or recordings will be made of any portions of the Study, nor will its contents be divulged in any way to unauthorized persons.



**In the
Supreme Court of the United States**

OCTOBER TERM, 1971

No. 71-1017

FILED
APR 13 1972

MICHAEL RODAK, JR., CL.

MIKE GRAVEL, UNITED STATES SENATOR
PETITIONER,

v.

UNITED STATES
RESPONDENT.

No. 71-1026

UNITED STATES
PETITIONER,

v.

MIKE GRAVEL, UNITED STATES SENATOR
RESPONDENT.

**BRIEF OF UNITARIAN UNIVERSALIST
ASSOCIATION, AMICUS CURIAE**

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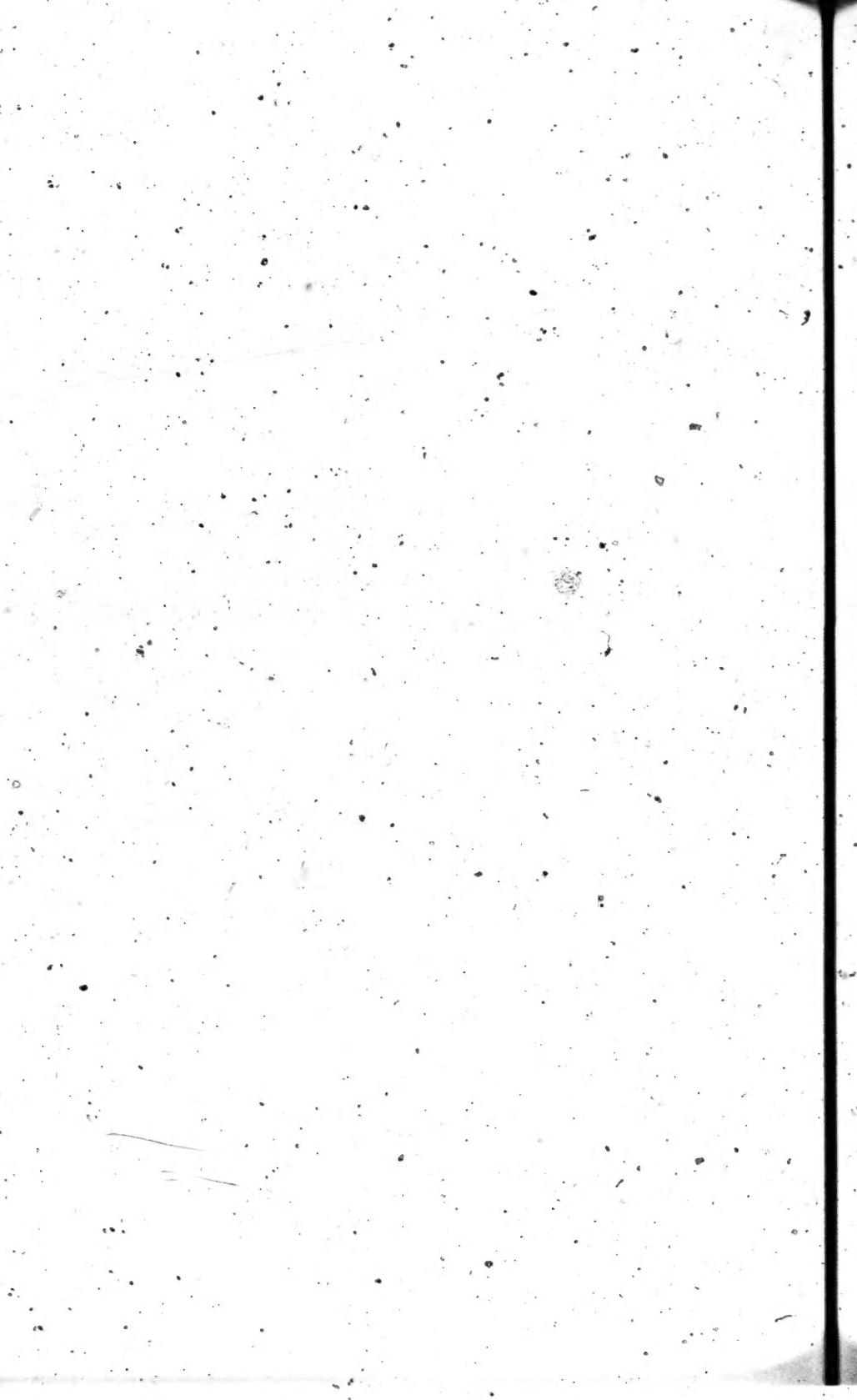


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**In the
Supreme Court of the United States**

OCTOBER TERM, 1971

No. 71-1017

**MIKE GRAVEL, UNITED STATES SENATOR
PETITIONER,**

v.

**UNITED STATES
RESPONDENT.**

No. 71-1026

**UNITED STATES
PETITIONER,**

v.

**MIKE GRAVEL, UNITED STATES SENATOR
RESPONDENT.**

**BRIEF OF UNITARIAN UNIVERSALIST
ASSOCIATION, AMICUS CURIAE**

Interest of Amicus

This brief is filed with the consent of the parties; it is submitted because, as will appear, the amicus has a direct and substantial interest in the outcome of this litigation.

Despite its interest, however, the amicus has no desire to burden this court with a brief which simply rehearses matters fully discussed by the parties. Accordingly, the amicus will endeavor to make its points with as much economy as possible.

The opinions below, jurisdiction of this court, questions presented, constitutional provisions involved, and statements of the case are adequately presented by the parties to this litigation; accordingly, they are omitted here. So far as pertains to this amicus, we invite the court's attention to the following facts. The amicus is a religious association established more than 200 years ago and incorporated under the laws of The Commonwealth of Massachusetts. Beacon Press is a division of the association and is subject to its direction and control. In its opinion of January 7, 1972, the court of appeals said:

"We would hold, if this appeal can be thought to raise that question, that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to [Senator Gravel] or others in connection with the [Pentagon] Papers subsequent to their introduction into the subcommittee records." (App.)¹

Thereafter, on January 11, 1972, the government served a grand jury subpoena on Gobin Stair, the director of Beacon Press and a second subpoena on him as custodian of the records calling for the production of all Beacon records pertaining to the Pentagon Papers publication. While these

¹ To be sure, the court of appeals subsequently noted that the amicus was not bound by the language in the opinion since Beacon Press was not a party to the case. While technically accurate, of course, the court's response is unconvincing. It is evident that the court's language reflects its considered judgment and would be adhered to in any further proceeding.

subpoenas have been withdrawn, the government, in papers filed in *Unitarian Universalist Association v. Joseph L. Tauro, et al.*, (D. Mass., No. 72-136-C), a related proceeding, said that "... identification of the participants in the transaction whereby the 'Pentagon Papers' were obtained and published by Beacon Press is sought, along with the details of such transactions."² The interest of the amicus is, therefore evident.

Argument

After concluding that the speech and debate clause³ necessarily insulated Senator Gravel from any inquiry into his publication in congress of the "Pentagon Papers and his prepublication activity in connection therewith—holdings not challenged by the government here—the court of appeals held that:

1. The clause did not prohibit grand jury inquiry into Senator Gravel's *subsequent* publication of the papers through Beacon Press, although the court *tentatively* accorded him a common law privilege against further interrogation (but not necessarily criminal liability) on that matter (App. p.). That holding is not directly challenged by the government in No. 71-1026 because it disclaims any intention of calling the senator. Nonetheless, the correctness of the holding is necessarily before this court because of its relationship to Senator Gravel's claim that his conduct cannot be inquired of through his legislative assistant or Beacon Press.

2. The immunity afforded by the speech and debate clause to the senator includes a prohibition against interrogation of his legislative assistant, Dr. Leonard S. Rodberg,

² Emphasis supplied throughout this brief unless otherwise specifically indicated.

³ "[F]or any Speech or Debate they [Senators and Representatives] shall not be questioned in any other place." U. S. Const. art. 1, § 6.

in connection with his work for the senator. (App. p.) That holding is challenged by the government.

3. The speech and debate clause does not prohibit grand jury interrogation of private persons about their dealings with Senator Gravel concerning his publication of the Pentagon Papers—except where the “object [of the inquiry] is to attack the legislator’s motives in speaking” (App. p.). That holding is challenged by the government as too broad, and by Senator Gravel and this amicus as too narrow.

The amicus will show that the court of appeals incorrectly abridged Senator Gravel’s rights under the speech and debate clause by holding that Beacon Press could be interrogated about its dealings with Senator Gravel in connection with his publication of the Pentagon Papers. In so doing, the amicus will establish the following propositions: (a) that Senator Gravel’s private publication is protected from grand jury inquiry by the speech and debate clause or by a common law privilege [Point I]; and (b), Senator Gravel’s privilege means that his conduct cannot be inquired of through the interrogation of his legislative assistant or Beacon Press. [Points II and III, *infra*.]

POINT I. PRIVATE PUBLICATION BY SENATOR GRAVEL IS PROTECTED FROM INQUIRY BY THE GRAND JURY.

A. *The Opinion of The Court of Appeals.*

The court of appeals recognized that the protection afforded by the speech and debate clause extends beyond simply insulating the senator from inquiry concerning any documents he introduced into congress. At least since *Kilbourn v. Thompson*, 103 U.S. 168, 204, it has been settled that the protection of the clause extends to all “things generally done . . . in relation to the business before [con-

gress].” See generally, *Powell v. McCormack*, 395 U.S. 486, 501-506. See also *Tenney v. Brandhove*, 341 U.S. 367, 376 (clause protects conduct “in the sphere of legitimate legislative activity”); *United States v. Johnson*, 383 U.S. 169, 172 (clause includes all conduct “related to the due functioning of the legislative process”). Nonetheless, despite these decisions and this court’s admonition that “the privilege should be read broadly,”⁴ the court of appeals gave the clause an extremely narrow scope. The clause, it said, protects only one category of “things generally done” in congress, namely, things “generally done” in relation to congressional deliberations. “Our courts,” said Judge Aldrich, “have expanded the privilege beyond the act of debating within congress . . . only when necessary to prevent indirect impairment of such deliberations” (App. p. . .). This position, in turn, led the court to reject the senator’s claim that his subsequent private publication of speeches made in or documents submitted to congress is protected by the clause.

The court of appeals was wrong in concluding that a senator’s private publication was not protected, *even assuming its narrow conception of the clause*. What is more, the court’s restrictive reading of the clause is inconsistent with its history and purpose, as well as the decisions of this court.

1. The court of appeals’ conclusion that the clause protects actions taken by a legislator “beyond the act of debating within Congress . . . only when necessary to prevent indirect impairment of such deliberations” finds no support in the decision of this court. Perhaps the result in *United States v. Johnson*, *supra*, could be rationalized in those terms. But, surely, it is a remarkable *tour de force* to set *Kilbourn v. Thompson*, *supra*; *Tenney v. Brandhove*,

⁴ *United States v. Johnson*, 383 U.S. 169, 179.

supra; *Dombrowski v. Eastland*, 387 U.S. 82 and *Powell v. McCormack*, *supra*, into that mold. Those cases, all of which extend the protection of the clause to legislative conduct unconnected with "the act of debating within Congress", can be viewed as an "indirect impairment" of debating only by a Pickwickian use of language. Moreover, if they are examples of "indirect impairment" of "debating", it passes understanding why executive infringement of a senator's prerogative of private publication does not constitute an even clearer case of "indirect impairment."

The scope of the speech and debate clause has been stated in terms which bear little resemblance to the language of the court below. In *Kilbourn* this court recognized that it "would be a narrow view of the constitutional provision to limit it to words spoken in debate" (103 U.S. at 204; see also *Powell*, 395 U.S. at 502). In rejecting such a narrow view *Kilbourn* relied upon *Coffin v. Coffin*, 4 Mass. 1, 27 (1808) — "perhaps the most authoritative case in this country on the construction of the privilege," (id. at 204)—where Chief Justice Parsons wrote:

• • • [T]he article ought not to be construed strictly, but liberally that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without enquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this

privilege when not within the walls of the representatives' chamber.

See also *Tenney v. Brandhove*, 341 U.S. 367, 374.

We submit that, in the twentieth century operation of the legislative process, there can be no room for doubt that the subsequent publication of documents laid before congress is an "exercise of the functions of the office" of a United States senator.

2: The court of appeals nowhere purports to demonstrate why the subsequent private publication of documents introduced into congress is not, in the court's language, "necessary to prevent indirect impairment of [congressional] deliberations." The court simply assumes that private publication will not have any effect on *future* congressional deliberations. That assumption is, on its face, highly vulnerable; congress is, after all, an ongoing body, and it would seem apparent that private publication by a United States senator represents one method of affecting future congressional deliberations. See, for example, the remarks of Senator Ervin in Congr. Rec. S 4614 col. 3, (March 22, 1972) (daily ed.). But the difficulty with the court's assumption is much more basic. The court's willingness to make *any* assumption about the effect of private publication on future congressional deliberations requires a degree of judicial superintendence of the legislative process which is wholly at odds with the doctrine of separation of power. It is for congress, not the court of appeals, to determine whether a senator's private publication of congressional documents will further future congressional deliberations.⁶

⁶ See *United States v. Johnson*, *supra*, 383 U.S. at 185, where the court recognized that the question of the reach of the speech and debate clause, would have been substantially affected by a congressional judgment that certain conduct was *not* protected by the clause. Cf. *Katzbach v. Morgan*, 384 U.S. 641, 656.

3. It is interesting to observe that the court below nowhere denies that private publication can aid future congressional deliberations. Rather, the court simply opines that such a claim "proves too much," because it would extend the protection of the clause to any speech made outside congress, at least if it had been previously delivered in congress. That possibility is brushed aside with the observation that "we do not believe [petitioner] has struck gold in a field previously thought to be barren" (App. p.). We would have supposed that more than an *ipse dixit* was required to dispose of a claim made by a United States senator. Moreover, the court of appeals never explains why subordinate executive officials are given an absolute common law privilege for their statements so long as they are made "within the outer perimeter" of their offices, *Barr v. Mateo*, 360 U.S. 564, 575,⁶ but a United States senator is not entitled to similar protection when he relies upon a specific constitutional provision. Nor does the court explain why, given the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open" (*New York Times v. Sullivan*, 376 U.S. 254, 270), congressional speeches repeated outside of congress, would not be protected entirely apart from the strictures of the speech and debate clause.

4. The infirmity in the court of appeals' position is further demonstrated by its concessions. It conceded that some kinds of publications were protected by the clause: petitioner could claim protection with respect to "republication such as in the news media or the congressional record, which is the *natural consequence of a speech* and is necessarily protected" (App. p.). Surely, the conclusion that one category of subsequent publication — by news-

⁶ In *Barr v. Mateo*, this court held that, in a libel action, the utterances of a federal official were absolutely privileged so long as they were made "within the outer perimeter" of his official duties.

paper — is a “natural consequence” of speech, but that other closely similar categories of publication — by book, etc. — are not, is wholly question begging, particularly so given the court’s further concession that, in fact, the latter type of publication “may be customarily done by members of Congress” (App. p. .). The court below was surely correct in its view that members of congress spend considerable time in various forms (e.g., radio, television, newsletters, etc.) of publication of their views. E.g., Hauser, *The Congressmen’s Conception of His Role*, 59 (Hennage Lithograph, 1963); Clapp, *The Congressman: His Work as He Sees It*, 100-101 (The Brookings Institute, 1965); Bibb and Davidson, *On Capitol Hill*, 13 (Holt, Reinhart & Winslow, 1967). If congressmen customarily engage in the private publication of their speeches why is that not a “natural consequence” of their speech?

In denying the petition for rehearing, the court of appeals sought to escape the foregoing difficulties by yet another formulation. The court suggested a distinction—

“between normal and customary republication of a speech in Congress and republishing privately all part of 47 volumes of, we must presently assume, lawfully classified documents through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern.”

(App. p. .). This shift in analysis is striking. What is “customary” publication now becomes a function of a judicial determination of what is relevant to a congressional subcommittee, not whether the publication is done “privately.” Plainly, any judicial assessment of what is “relevant” to a congressional committee intrudes a court far into the legislative process itself — an intrusion which, we believe, is in manifest conflict with time-sanctioned

principles of separation of powers. Not only is this difficulty ignored by the court of appeals, its new analysis is advanced without even a glancing reference to its earlier conclusion that the "privilege protects against a claim of irrelevancy" (App. p.). Compare *Coffin v. Coffin*, *supra*. *Tenney v. Brandhove*, *supra*, 341 U.S. at 374. See also remarks of Senator Ervin, Congr. Rec. S 4614 col. 1 (March 22, 1972) (daily ed.).

5. Underlying these difficulties is the court's effort to confine the speech and debate clause to its narrowest historical setting. Like its predecessors in the English Bill of Rights, the Articles of Confederation and the state constitutions, the clause specifically prohibits executive sanctions for speeches made in the legislature. But, like the other provisions in a document "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," (*McCulloch v. Maryland*, 4 Wheat. 316, 415) the clause has a breadth and meaning which transcends the specific events which gave it birth. See *Powell v. McCormack*, 395 U.S. 486, 506. The clause "reinforce[s] the separation of powers so deliberately established by the Founders", and must, therefore, be "recognized as an important protection of the independence and integrity of the legislature." *United States v. Johnson*, 383 U.S. at 178. Not surprisingly, then, "the language of the Constitution is framed in the broadest terms" and it must be "read broadly" (*Id.* at 179, 182-83). This, in turn, means that the clause "cannot remain static if it is to remain meaningful."⁷ Its precise contours are

⁷ "In its application, it must be geared to the realities of the manner in which a modern legislative system operates. It cannot afford to be permanently attached to the ways in which legislatures discharged their responsibilities when the Republic was founded, or for that matter, even fifty years ago. . . . Modern legislatures have had to adopt [sic] their techniques of operation to the increasingly complex society within which they must function. New techniques and new

and have always been shaped by what is appropriately and "customarily" done in the legislative process of the day. E.g., Neale, *The Commons' Privilege of Free Speech in Parliament*, in *Tudor Studies* (Seton-Watson ed. 1924) at 164-165.⁸ Accordingly, contemporary legislative practice, not seventeenth and eighteenth century history, measures what is "generally done . . . in relation to the business before [congress]." That result is, of course, consistent with our constitutional tradition. See *McCulloch v. Maryland*, *supra*; *Missouri v. Holland*, 252 U.S. 416, 433; *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 442-43; ["If . . . it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation."] *Harper v. Board of Elections*, 383 U.S. 663, 669; Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 59 (1955).

6. The court's effort to confine the speech and debate clause to its narrowest historical setting shows, moreover, that, on this occasion, the court was a bad historian. The speech and debate clause was adopted by the constitutional convention "without discussion and without opposition" largely because it was a familiar one, having existed in the Declarations of Rights, the Articles of Confederation and in various state constitutions. *United States v. Johnson*, *supra*, at 177. Plainly, therefore, the general import of the clause, if not all its details, was under-

methods of procedure have gradually evolved. The doctrine of legislative privilege cannot remain static if it is to remain meaningful." Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate*, 2 Suffolk U.L.R. 34 (1968).

⁸ As Madison observed, "difficulties and differences of opinion may arise" in applying the privilege to "emerging cases." However, in "deciding on these the reason and necessity of the privilege must guide" 4 *Writings of James Madison* 221.

stood by members of the constitutional convention. One might observe that the Framers recognized that the clause represented a crucial milestone in securing legislative independence from "prerogative rule." No longer could legislators be punished for speeches displeasing to the crown. *Tenney v. Brandhove*, *supra* at 372-75; *United States v. Johnson*, *supra* at 181-183. In addition, this country had less than a decade of experience under the new constitution when Vice President Jefferson pointed to the policies underlying the clause as a basis for a vigorous protest against a grand jury investigation of the conduct of certain congressmen in sending circulars to their constituents critical of administration policy toward France. *Works of Thomas Jefferson*, Vol. 8, 322-31 (Ford ed.). See also *Lyon's Case*, Case No. 8, 646, 15 Fed. Cas. 1183, particularly at 1190-91 (C.C.D. Vt. 1798).

Moreover, it seems clear that the clause's admittedly spare language was understood by the framers to protect not only a legislator's free and untrammelled participation in the legislative process, but also his duty to contribute to an enlightened electorate⁹ — a point vigorously urged, we might add, by the government itself (Br. p. 19) in *United States v. Brewster*, No. 71-15. The court below failed to appreciate that the speech and debate clause "performs an important function in representative government." *Powell v. McCormack*, *supra*, at 503. And representative government presupposes that a legislator may communicate with his constituents and the country at large, as well as with his colleagues. *Bond v. Floyd*, 385 U.S. 116, 136 ("Legislators have an obligation to take

⁹ Thus both the Massachusetts constitution of 1780 and the New Hampshire constitution of 1784 explicitly tied the protection of their clauses to that of the "rights of the people." See *Tenney v. Brandhove*, 341 U.S. 367, 373-74. See also, for example, 1 *Works of James Wilson*, 421-22 (McCloskey ed. 1967).

positions on controversial political questions so that their constituents can be fully informed by them." See Wilson, *Congressional Government*, 297 (1885). As Harold Laski observed, the legislature "provides a process of public education which is pivotal to democratic government." *The American Presidency*, quoted in R. Bolling, *House Out of Order*, 29 (E. P. Dutton Co. 1965).

7. Finally, even assuming the court of appeals' reading of history, we think it evident that the clause protects petitioner's publication of the Pentagon Papers. For we have here little more than ancient problems in a twentieth century context: the executive still seeks to intimidate and discipline members of the legislature for conduct which casts aspersions upon the executive's handling of a matter of overriding national interest. The only difference between this effort and that of earlier times is that techniques more appropriate to our age, interrogation, harassment and exposure, have been substituted for the ancient devices of arrest and imprisonment.¹⁰

B. *The Realities of Separation of Power.*

As we have shown, the effort by the court of appeals to deny the protection of the speech and debate clause to a senator's subsequent publication of documents introduced in congress will not withstand scrutiny either analytically or historically. What is more, the court's holding wholly ignores the real nature of the separation of powers issues involved here. This case presents a sharp conflict between the executive and a member of congress. The claim for protection of legislative independence here is an extremely powerful one, far more imposing indeed than if it had been made in 1789. The separation of powers prescribed by

¹⁰ It is well worth noting here that the court below did not in fact rule out criminal prosecution for petitioner. (App. pp.)

the constitution admits of considerable fluidity in terms of the actual powers exercised at any time by each branch of the government. See, for example, Monaghan, *Presidential War-Making*; 50 B.U.L. 19, 24-25. The twentieth century has witnessed a vast accretion of power in the executive branch at the expense of the legislative branch. Monaghan, *supra*. At least since 1932 we have, perhaps irreversibly, entered into an era of "presidential government," as Professor Kurland rightly observes.¹¹ And in no area is presidential dominance more clear than in foreign affairs.¹²

These realities must be kept in mind in assessing the scope of the protection currently afforded by the speech and debate clause. If the goal of preserving the integrity of the legislative branch (*United States v. Johnson*) is to be achieved, the legal principles must take into account the actual distribution of power between the two branches of government. So understood, there is no basis for the grudging approach to the clause displayed in the court below. Any such view is, we might add, particularly inappropriate when sweeping claims of presidential prerogatives in foreign affairs are joined with equally sweeping claims of executive privilege in favor of secrecy.¹³ A prime factor in the decline of congressional effectiveness is its inability to obtain information (Hauser, *Congressional Reform*, 47 N.D. Lawyer 442, 452-463), and "the most

¹¹ Kurland, *The Impotence of Reticence*, 1968 Duke L.J. 619, 727-28. Burns, *Presidential Government*, (1965). Compare Woodrow Wilson, *Congressional Government* (1885).

¹² For a defense of these presidential prerogatives by one of counsel for amicus which is not shared by the amicus itself, see Monaghan, *Presidential War-Making*, *supra*.

¹³ Cf. *United States v. New York Times*, 403 U.S. 713; see also President Nixon's persistent refusals to permit Dr. Henry Kissinger to testify before congress. One would think that the very fact of presidential dominance in the area of foreign affairs would be the strongest argument *against* wide ranging claims of executive secrecy in that area! See also Hauser, *supra*, at 460.

striking feature of the [congressional] information system . . . is its heavy dependence on the President . . . (Id. at 454)." See also remarks of Senator Mathais, Congr. Rec. S. 4616, col. 3 (March 22, 1972) (daily ed.). Surely, something in our framework of government is askew when members of congress feel compelled to intervene in the "New York Times case" so as not to be deprived of information about governmental policy in Vietnam.¹⁴

Here the executive has failed to maintain effective security over documents originally in its possession. Failing to keep its own house in order (Stewart, J. concurring in *New York Times v. United States*, 403 U.S. 713, 728-29), it now seeks to discipline a member of congress for his exposure of its conduct. The core question in this case turns on its right to do so. We think that the publication of documents by a congressman is a matter for congress, not for the executive or the courts. It is one thing for congress to lay down rules with respect to the publication of documents and to enforce those rules against its members.¹⁵ (Indeed in *United States v. Brewster*, No. 71-15, the government's brief (pp. 12-24) spends considerable time in demonstrating that congress can discipline its own members, and of special pertinence here the government details instances (Br. p. 18 n. 16) in which colonial legislatures imposed sanctions upon their own members for the unauthorized disclosure of documents. See Clarke, *Parliamentary Privilege in the American Colonies*, 181-82 (1943). But Senator Gravel's conduct is a matter of scrutiny for congress alone; he "shall not be questioned in

¹⁴ The briefs filed by members of congress in the lower federal court, *United States v. Washington Post*, decided with *United States v. New York Times Company*, *supra*, is printed 117 Cong. Rec. E 6356-60, see also Brief of 27 Members of Congress as *Amicus Curiae* in *New York Times* case, printed at 117 Cong. Rec. E 67-3-06.

¹⁵ We do not mean that the rules are necessarily valid, only that the issue would be far different than that presently before this court.

any other Place." See generally Congr. Rec. S 4613-4623 (March 22, 1972) (daily ed.); id. S 4721-4735 (March 23, 1972) (daily ed.). The only restraints imposed upon members of congress, therefore, stem from the legislative process itself (U.S. Const. art. 5) or from the electoral process. "Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses" *Tenney v. Brandhove*, 341 U.S. 367, 378, a result which of course is entirely consistent with underlying assumptions of our policy. Cf. *Munn v. Illinois*, 94 U.S. 113, 134 ["For protection against abuses by legislatures the people must resort to the polls, not to the courts"].

POINT II. THE PROTECTION OF THE SPEECH AND DEBATE CLAUSE EXTENDS TO CONGRESSIONAL EMPLOYEES.

The court of appeals had no difficulty in concluding that the protection afforded by the speech and debate clause to "Senators and Representatives" necessarily embraced at least their legislative assistants. "It is not only accepted practice," said Judge Aldrich, "but we would think indispensable, for a legislator to have personal aides in whom he reposes personal confidence." The government's petition for certiorari (No. 71-1026, p. 13) urges that this was error, that the protection of the clause "should not be broadly extended to legislative aides, who are subject neither to the judgment of the electorate nor to the imposition of criminal penalties or [congressional] discipline." The government asserts that protection should be extended "only in those unusual situations where the activities of the legislative aide are closely and directly related to the actual performance of the legislator's speech or debate."

It is unclear what limits the government has in mind. The suggestion seems to be that the clause protects a

senator against interrogation of his legislative assistants only where the legislator himself is engaged in "speaking or debating." We do not understand the logic of such a position. As has been shown, "speaking or debating" is only *one* instance of the protection afforded by the clause to the legislator himself; a legislator is protected by the clause in his voting, committee work, etc. We cannot comprehend why, if the clause extends to legislative assistants at all, they share in the protection only in one category. Moreover, this court has expressly recognized that the immunity of the clause may extend to congressional employees in situations which do not conceivably fit the government's formula. *Kilbourn v. Thompson*, 103 U.S. 168 and *Dombrowski v. Eastland*, 387 U.S. 82, 85, both recognize that protection for congressional employees might exist in situations not involving "speech" by the legislator. [The reason for ultimately denying protection to the congressional employees in *Kilbourn* was not an *a priori* judicial determination not to protect congressional employees but because the legislative conduct in that case invaded constitutionally protected individuals rights. See 20-21, *infra*. Compare *Anderson v. Dunn*, 6 Wheat. 204, distinguished in *Kilbourn* (103 U.S. at 196-197), protecting congressional employees under the clause for a congressionally authorized arrest.]

The government's restrictive reading of the clause has little to commend it.¹⁶ Emphasizing the importance of

¹⁶ The government's assertion that legislative aides are not subject to either criminal penalties or congressional discipline is, we think, wholly unsound. As we shall show, they have less protection than the senators and representatives themselves. We are not faced here with a criminal statute sought to be applied to a legislative assistant; nor are we faced with the validity of disciplinary action taken by the senate. *Kilbourn v. Thompson*, relied upon by the government, surely does not foreclose the latter possibility. It holds only that our jurisprudence has not taken over the whole body of the *lex et*

grand jury investigations provides no sufficient reason for, as Senator Ervin observes, it is not apparent why one should "place a higher value on the function of a grand jury . . . than upon the duty of a legislator to legislate for the interests of 200 million people in the United States . . ." Congr. Rec. S 4726 col. 3 (March 23, 1972) (daily ed.). The focus must, therefore, be upon the legislative process, not the needs of the grand jury. And the central fact of twentieth century legislative process is its staggering complexity:¹⁷

"The legislative giants of the 19th century — the Clays, Calhouns and Websters — could afford to devote a whole generation or more to refining and debating the few great controversies of the Republic. The contemporary legislator cannot take such a leisurely approach; he finds himself beset daily by a staggering number and range of public problems, both large and small." Bibby and Davidson, *On Capitol Hill — Studies in the Legislative Process*, 260 (New York: Holt, Rinehart and Winston, Inc. 1967).

It is, accordingly, surely apparent that a senator could not possibly function without the assistance of an adequate staff. For constitutional purposes, "the aide and the legislator [must be] treated as one," as the court of appeals correctly recognized. Were it otherwise, a senator "could

consuetudo parliamenti — a body of English law which gave Parliament almost unlimited power to punish anyone for offenses to its dignity. There was no suggestion that the senate was without power to impose discipline on its own employees.

¹⁷ The First Congress saw a budget of 4.3 million dollars, and 144 bills were introduced. By contrast, the Ninety-First Congress generated 210.3 billion dollars in expenditures and had to deal with 25,215 measures! Hauser, *Congressional Reform*, 47 N.D. Lawyer 442, 444 (1972).

not possibly function for a single day" as Senator Erwin recently observed. Congr. Rec. S 4724 col. 3 (March 23, 1972) (daily ed.). See generally Kofmehl, *Professional Staffs of Congress* (Purdue Research Foundation 1962). The government, it should be noted, recognizes in another context the importance of recognizing that government officials must perform through subordinates. In support of a petition for rehearing in *United States v. Robinson*, No. 71-1058 — F.2d — (5 Cir. 1972), the government, citing the decision of the court below, said (p. 2): "The practice of having a personal aid in whom an official must and does repose total confidence is well-known and widely accepted, not only in the executive branch as well [citations]. The nature of such a relationship demands that the aid and the officer be treated as one." For some reason, not here explained, the government assumes a flatly contrary stance.

In one respect, however, the reasoning of the court below may mislead. It might be taken to suggest that the clause protects only some kinds of congressional employees, e.g., "personal aides." That is not the case. All congressional employees, be they the sergeant-at-arms (*Anderson, Kilbourn*) or committee counsel (*Eastland*) are, in appropriate circumstances, covered by the clause. See the discussion in *Dombrowski v. Eastland*, 387 U.S. 82, 85. The reason is evident: the complexity of government requires that a senator act through numerous assistants who perform many and varied tasks, all of which are necessary to the proper and effective functioning of congress. Accordingly, there is no reason to differentiate among congressional employees so far as the protection afforded to a senator by the clause is concerned. As the court of appeals in *Doe v. McMillan*, No. 71-1027 — F.2d — (D.C. Cir. 1972) cert. den. — U.S. — recognized:

"In this day of complex public problems, where assignment of authority by legislators to legislative assistants is an absolute necessity if Congress is to be able to perform its constitutional functions, it would indeed be hollow to afford immunity to the Congressmen, but not to their assistants, for these aides might be hesitant to undertake the full performance of their lawful duties if they had to face the threat of possible lawsuits. Such an inconsistent result would impossibly hinder congressional activities, and effectively prevent the attainment of the objectives underlying the Speech or Debate Clause. We therefore must conclude that the suit against the Federal legislative employees was properly dismissed due to their legislative immunity." (p. 18)

McMillan is supported by the language of this court in *Barr v. Mateo*, 360 U.S. 564, 572-73, recognizing that "the complexities and magnitude of governmental action have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the Executive hierarchy."

We would not be understood, however, as saying that the protection of congressional employees is identical to that of "senators" and representatives themselves. An unbroken line of decisions in this court, extending from *Kilbourn v. Thompson*, forecloses any such argument. E.g., *Dombrowski v. Eastland*, supra, at 85. *Powell v. McCormack*, 395 U.S. at 504. Where the legislator's action results in the deprivation of individual rights secured by the constitution of the United States, it is doubtful whether congressional employees are protected at all. *Kilbourn v. Thompson*, (103 U.S. at 196 et seq.) appears to settle that point.

Thus congressional employees may be subjected to both damages (*Kilbourn, Eastland*) and to injunctive orders (*Powell*) in situations of that character. E.g., *Stamler v. Willis*, 415 F.2d 1365, 1368 (7 Cir. 1969), cert. den. 399 U.S. 929. However, a member of congress could not be made to respond in damages (*Kilbourn v. Thompson; Dombrowski v. Eastland*), nor, ordinarily, to an equity decree (*Powell*).¹⁸

The fact that congressional employees may not be accorded the same protection as "Senators and Representatives" where congressional action has invaded individually protected rights is no assistance to the government here, of course. The liberties protected by the due process clause and other constitutional provisions do not run to governmental units. See *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24. Cf. *Township of River Vale v. Town of Orangetown*, 403 F.2d 684, 686 (2 Cir. 1968). And there is no claim here that Senator Gravel or Beacon Press have invaded any individual rights. Compare *Doe v. McMillan*.

POINT III. BEACON PRESS CANNOT BE INTERROGATED CONCERNING SENATOR GRAVEL'S DEALINGS WITH IT IN CONNECTION WITH HIS PRIVATE PUBLICATION OF THE PENTAGON PAPERS.

A. *The Decision of the Court of Appeals.*

The court of appeals restricted the protection of the speech and debate clause in a manner of crucial significance

¹⁸ It is possible that in appropriate circumstances declaratory and injunctive relief might be permitted to vindicate individually secured constitutional rights. *Powell v. McCormack*, 395 U.S. at 506, n. 26, expressly leaves that issue open. *Atlee v. Nixon*, ___ F. Supp. ___ (D. Penn. 1972) 40 L.W. 2472. Cf. *Davis v. Ichord*, 442 F.2d 1207 (D.C. Cir. 1970); *Ansara v. Eastland*, 442 F.2d 751 (D.C. Cir. 1971).

here. Inquiry of private parties concerning Senator Gravel's publication of the Pentagon Papers was not barred by the clause it said unless (citing *Johnson*) "the object [of the inquiry] is to attack the legislator's motives in speaking" (App. p.):

"With respect to third persons, provided that the principles of *Johnson* are observed, we can see no reason for them to be free of inquiry as to their own conduct regarding the Pentagon Papers, including their dealing with the intervenor or his aides... [we] hold that no immunity was conferred upon Beacon Press simply because, if he did, intervenor delivered the Papers to it for private publication. Indeed, we would hold, if his appeal can be thought to raise that question, that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to intervenor or others in connection with the Papers subsequent to their introduction into the subcommittee records. Payment for delivering a copy, by a post-speech agreement, is not comparable to a payment for initially delivering the speech...."

The importance of this holding cannot be underestimated. It is evident that, given the complexity of modern government, any legislator will and must frequently act in cooperation with or through private parties (as well as congressional employees) in the discharge of his functions. Simply put, this is a necessary and "customary" aspect of the functioning of the legislative process in the twentieth century. Accordingly, even the narrow protection afforded by the clause under the holding of the court of appeals is, on analysis, illusory: wherever the clause shields a senator

(from direct inquiry,¹⁹ his conduct can still be inquired of through interrogation of any private parties with whom he dealt. Surely, this result cannot be rationalized in terms of the underlying purpose of the clause. Direct interrogation of the legislator is barred by the clause, said the court of appeals, in order to prevent "[i]ntimidation . . . harassment, embarrassment" resulting from exposure (App. p.). Yet the court below was willing to countenance precisely the same evils so long as they took a different form—so long as the interrogation is not of the senator but of the third parties with whom he dealt. But quite clearly the only difference is the point at which the executive pressure is laid, not the end result. See *Powell v. McCormack*, *supra*, 395 U.S. at 505. And the end result of allowing unlimited inquiry either of the legislator or of third parties necessarily must be either to intimidate the legislator in the discharge of his constitutional functions, and/or to intimidate those private persons with whom he would deal.

The court of appeals, however, thought that a legislator's rights are adequately secured so long as private party inquiry is prohibited where its "object is to attack the legislator's motives in speaking" (App. p. 12). It is difficult to see what relevance this limitation could have here since Senator Gravel's private contacts occurred after he placed the Pentagon Papers before congress. More fundamentally, however, in the context of this problem (compare *United States v. Johnson*, *supra*), the suggested standard lacks meaning, as the government itself expressly recognizes in its petition for certiorari (p. 12). By what criteria could a court determine whether "the" object of a grand jury interrogation of Beacon Press concerning Senator Gravel's

¹⁹ For example, under the court of appeals' view, Senator Gravel could not be interrogated by the grand jury concerning his preparation for and placing of the Pentagon Papers before the senate.

publication of the Pentagon Papers was to "attack" his motives in speaking!²⁰ See *Tenney v. Brandhove*, 341 U.S. 367, 377. Finally, we do not understand why the protection of the clause should depend upon "the object" of the interrogator! The injury done to the legislator in no significant way depends upon a resolution of that elusive element.

B. *The Government's Position*

The government agrees that the court of appeals' analysis is unsound. The government, however, urges (p. 10) that the clause affords *no* protection to a senator against interrogation of private parties. "[C]onceivably," it admits, "the grand jury testimony of [private] persons touching on the performance of legislative acts *might* embarrass or impune the motives of a legislator and *conceivably* that possibility might inhibit a congressman in performing his legislative activities." But, says the government, a "*hypothetical* hindrance of legislative activity . . . is of course of a different order from that which would occur if the legislator himself were [interrogated]" The key words in the government's argument are, of course, "conceivably," "might" and "hypothetical" — characterizations by which the government seeks to minimize the impact of interrogation of private persons on the legislator involved.

The government's argument will not withstand careful analysis. The sole *concrete* justification it offers in its petition for distinguishing between interrogation of a senator directly and of a private party with whom he dealt is contained in a single phrase. The senator's "own time is in no way being expended. Nor is he personally distracted in

²⁰ The test employed by the court assumes a simple and monistic conception of the interrogator's purpose. Quite clearly, however, the interrogation may be proceeding for multiple and complex reasons.

the performance of his legislative duties." (p. 11) The government is, of course, correct in recognizing that one function of the clause is to prevent waste of a legislator's time. See *Powell v. McCormack*, *supra*, 395 U.S. at 505. To that extent, there is, as the government contends, some difference between interrogation of third parties and of the senator himself. However, we do not understand why the government also believes that the "personal distraction" of a legislator is not substantially identical whether he is questioned about his dealings with x or x himself is subject to questioning on the same point. The government's psychological theory is by no means self-evident. See *Powell v. McCormack*, *supra*, at 505. In any event, what the government wholly ignores is that the *principal* function of the clause is to prevent not distraction, but intimidation and harassment of a legislator, a point which, incidentally, it fully recognizes in its brief (p. 20) in *United States v. Brewster*: "the immunity conferred by the clause was intended to prevent legislative intimidation by or accountability to other branches of government... Immunity from potential harassment whatever its form [is important.]" It bears emphasis that freedom from executive intimidation is the core value protected by the clause. As we have shown (pp. 13-16) that threat is a real one, and in that regard nothing of substance turns on whether the interrogation is of the senator or of the parties of whom he dealt. The only difference is the point at which the executive pressure is focused.

C. *The Scope of the Protection for Private Parties.*

There is *dicta* in at least two decisions asserting that the protection of the clause does not extend to a legislator's dealings with private parties.²¹ There is, however, authority

²¹ *Long v. Ansell*, 69 F.2d 386 (D.C. Cir. 1934) *aff'd*, 293 U.S. 76; *McGovern v. Martz*, 182 F. Supp. 343 (D.C. Dist. Col. 1960).

recognizing protection for private parties for private publication of legislative speeches. The English decisions culminating in *Wason v. Walters*, L.R. 4 Q.B. 73 (1868), which are analyzed in *Report from the Select Committee on the Official Secrets Act* (1939), rest in part at least on such a premise. See *Walter, supra*, 4 Q.B. at 92-96. This court has never resolved the extent to which a senator's protection under the speech and debate clause extends to his dealing with private parties in either of two distinct situations: first, with respect to their legal accountability for action taken in conjunction with members of congress, an issue, which, of course, is not raised here;²² second, and of grave importance here, the extent to which private parties can be interrogated concerning their dealings with a member of congress, *the direct inquiry of whom could not be undertaken*. That the questions of legal accountability and of interrogation are quite distinct was fully appreciated by the court below (App. p.). While the latter question is concededly an open one here, we think it evident that full protection for a legislator in the twentieth century necessarily includes protection for his dealings with private persons. Surely the protection of the clause does not depend, as the court of appeals' ruling would have it, on whether Senator Gravel publishes the material himself via his own xerox machine or he employs a private printer to do the same thing. Nor does it depend, as the court below also holds, on whether the New York Times prints the proceedings and documents before Senator Gravel's Committee rather than Beacon Press publishing them.

The court of appeals recognized that protection afforded by the clause to senators necessarily included protection of legislative assistants. But, as we have said, there is no reason to confine the clause to legislative assistants. "Se-

²² The question would arise if Beacon Press were subjected to criminal prosecution for its publication of the Pentagon Papers.

nators" and "Representatives" must act through a whole host of congressional employees. *Dombrowski v. Eastland*, 387 U.S. 82, 85. Accordingly, *Doe v. McMillan*, — F.2d — *supra*, correctly recognized that the clause protects not only members of congress but federal employees assisting them in publishing a congressional committee report. We submit that there are no relevant differences between Beacon Press and the federal employees in *McMillan*, particularly once it is conceded that private publication by members of congress is "customary." To so hold would elevate form over substance. *So long as the private party performs functions analogous to those performed by congressional employees they too are protected to the same degree as the employees* — at least absent a congressional determination to the contrary. As Senator Ervin observed:

"A Senator has the right to seek the assistance of anyone in the performance and execution of the duties of his office. And he cannot be called upon to answer for the exercise of those duties by the examination of any of his assistants that he avails himself of."

Congr. Rec. S 4621, col. 2 (March 22, 1972) (daily ed.). Here there are no relevant distinctions between Beacon Press and the government printer. See *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180 (D.D.C. 1970). Surely, if congress abolished that position and thereby channeled all congressional publication to private printers the constitutional question — so far as the speech and debate clause is concerned — would be no different. The policies of the clause do not turn upon who pays the printer.

Moreover, even if private parties performing functions analogous to those performed by congressional employees are not protected by the clause there is solid reason for

recognizing that protection at least for private printers of congressional works. Private printers, unlike other private parties, play a unique role: historically much litigation has centered on efforts to prevent the press from publishing legislative proceedings and materials. See p. 12, *supra*. This is hardly surprising because the press permits a congressman to perform a most vital task — keeping his constituency and the public informed — and, as the government itself recognizes, historically the speech and debate clause was tied to ensuring an enlightened electorate. Thus should the government printer not publish the documents for lack of authority or funds, or any other reason, "private printers can fill the gap."

D. *The Decisions of This Court.*

As we have observed earlier (pp. 20-21), we fully appreciate that the protection afforded to private parties is not co-extensive with those of the legislator. *Kilbourn v. Thompson*, *supra*; *Dombrowski v. Eastland*, 387 U.S. 82, 85; see also *United States v. Johnson*. But the cases are not dispositive of the extent to which third parties can be interrogated about their dealings with a senator concerning publication. In *Kilbourn* members of congress were held protected by the clause, but the congressional marshals were held responsible in damages for the execution of an unconstitutional legislative arrest order. See also *Dombrowski v. Eastland*, 387 U.S. 82, 85; *Powell v. McCormack*, 395 U.S. 486, 501-506. Thus in *Kilbourn*, the clause operated so as to protect legislators, but not third parties, from the consequences of unconstitutional action which deprived citizens of rights secured to them by the Constitution of the United States. *Kilbourn* expressly recognizes the point, distinguishing *Anderson v. Dunn*, 4 Wheat. 204, on that ground. See also *Powell v. McCormack*, *supra* at 503-504.

Here, by contrast, there is no claim that any citizen's constitutionally protected liberty has been abridged by the tortious conduct of private parties. See p. 21, *supra*. Moreover, here the crucial question does not turn on the legal accountability of Beacon Press (e.g., in a criminal case) for its conduct,²³ but on whether it can be interrogated about its dealings with Senator Gravel *in circumstances where he cannot be interrogated directly*. Kilbourn and its progeny are not even remotely relevant to that question.

Nor does *United States v. Johnson*, *supra*, implicitly recognize that private parties are wholly beyond the protection of the clause. It may very well be that under the clause those who attempt to bribe a senator may be prosecuted even though the senator himself escapes prosecution. Cf., *United States v. Brewster*, No. 71-15.²⁴ That, as we said, is because the protection afforded by the clause is not unitary—the clause protects congressional employees to a lesser extent than the senators and representatives themselves. *Dombrowski v. Eastland*, 387 U.S. 82, 85. But the crucial point is that, for the purposes of the clause, *there is no relevant distinction between a congressional employee and a private party performing essentially the same tasks*. If a prosecution would validly lie against a private party it would also lie against a congressional employee for the same conduct. See the discussion in note 16, at p. 17.

We submit that, given both the complexity of the modern governmental process and the dominant role of the president therein, the protection afforded by the speech and debate clause to a United States senator should extend not only to congressional employees who assist him but also to private parties performing similar tasks. This is, as we

²³ We, of course, do not concede that criminal sanctions could validly be imposed for that conduct.

²⁴ See also Luce, *Legislative Assemblies*, Ch. 13 (Houghton Mifflin Co. 1924).

have said, certainly true at least with respect to private printers. If the constitution shielded Senator Gravel's own publication²⁵ of the Pentagon Papers or his publication of the document through the public printer, we see no acceptable basis for denying a similar constitutional shield to his dealings with a private printer. Surely, this is in keeping with the great purpose of the clause. This court is, it should be noted, not faced with a legislative judgment that such protection of third parties is unnecessary. In such a case great weight would be accorded to the congressional determination of the meaning of a clause touching centrally upon its own legislative prerogatives. See *Katzenbach v. Morgan*, 384 U.S. 641, and Cox, *The Role Of Congress In Constitutional Determinations*, 40 University of Cincinnati Law Review 199. But see brief for appellees in *United States v. Brewster*, *supra*, at pp. 49-72.

POINT V. A COMMON LAW PRIVILEGE EXISTS FOR BEACON PRESS PROTECTING IT FROM INTERROGATION BY THE GRAND JURY

A. *The Necessity For A Privilege.*

The court of appeals concluded that neither Senator Gravel nor his legislative assistant were protected by the speech and debate clause from inquiry concerning the senator's private publication of the Pentagon Papers. However, apparently concerned with the unseemly character of a grand jury interrogation of a United States senator or his legislative assistant about the senator's decision to engage in private publication, the court held that both were protected from interrogation by a common law privilege.

Even if Senator Gravel could not invoke the protection of the speech and debate clause for Beacon Press, neither the court of appeals in its opinion nor the government in

²⁵ E.g., if Senator Gravel had his own printing press or a xerox machine.

its petition for certiorari explains why Senator Gravel's common law privilege does not include Beacon Press as well as the senator and his legislative assistant. Compare *Doe v. McMillan*, *supra*, where the court of appeals recognized a privilege for officials of the District of Columbia who supplied information for a report issued by a congressional committee.

Recognition that any common law privilege of Senator Gravel from interrogation embraces protection against interrogation of the printer with whom he dealt is, of course, supported by all the considerations described in Point IV in support of recognizing the constitutional character of Senator Gravel's claims re Beacon Press. We have no desire to burden this court with a repetition of those considerations. We earnestly submit, however, that whether they convince this court that they are of constitutional dimension, they are clearly weighty enough to support the privilege here claimed.²⁶ Surely, judicial recognition of privilege is appropriate for a printer who reproduces documents laid before congress by a United States Senator. Such a privilege, even if not constitutional dimension and therefore subject to legislative revision, makes meaningful Senator Gravel's prerogatives.

B. *The Power To Fashion A Privilege.*

There is, we think, no doubt that this court has power to fashion a privilege in these circumstances. *Erie v. Tompkins*, 304 U.S. 64, makes clear there is no general law-

²⁶ And such a privilege is particularly appropriate given common law willingness (in another context to be sure) of a privilege to printers to report public proceedings. Indeed, it seems to us that, independently of the speech and debate clause or any common law privilege, Beacon Press's activity in publishing the Pentagon Papers is protected under the first amendment. See, for example, *Time, Inc. v. Pape*, 401 U.S. 279.

making power in the federal courts. To the extent that this court fashions law, it is because "principles formulated by federal judicial law have been thought by this court to be necessary to protect uniquely federal interests . . . [Of] course the federal interest granted in all these cases is one the ultimate statement of which is derived from a federal statute." *Banco Nacional De Cuba v. Sabatino*, 376 U.S. 398, 426. Or from the constitution itself *Sabatino*, 376 U.S. 427, at n.25.²⁷ *Southern Pacific Co. v. Jensen*, 244 U.S. 205; Friendly, *In Praise of Erie — and the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). In either case, the court fashions such law as is "necessary to protect uniquely federal interests" because it reasons that this is necessary to achieve the statutory or constitutional purpose. Thus, properly speaking, the privilege is not a "common law" one, but one which has its roots in some federal constitutional or statutory provision.

This court has not hesitated to fashion privileges where necessary to implement the arms of federal statutory or constitutional provisions. In *Barr v. Mateo*, 360 U.S. 564, the court recognized that certain otherwise tortious conduct of federal officials was privileged, so long as it fell "within the outer perimeter of their duties." See also *Pierson v. Ray*, 386 U.S. 547 (privilege for state officials). See also *Bivens v. Six Unnamed Narcotics Agents*, — F.2d — (2 Cir. 1972), 40 L.W. 2608, on remand from 403 U.S. 388. *Tenney v. Brandhove*, 341 U.S. 367 is particularly relevant here. There this court relied very heavily on the policies behind the speech and debate clause to hold that 42 U.S.C. § 1983, must be read to recognize a common law privilege for action taken by state legislators. The court fashioned the privilege because its existence would be

²⁷ As Professor Hill observes: "the federal courts may make substantive law only in effectuation of a policy derived from the constitution or from a valid act of congress." Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013, 1050.

"related to the presuppositions of our legal history" (id. at 372).

We urge the court to follow *Tenney* here. We submit that in the absence of express congressional action, this court should hold that a private party performing acts similar or analogous to congressional employees on behalf of a United States senator — at least if the private party publishes documents placed before congress — is privileged *to the same extent that action by the federal employees themselves would be privileged under the speech and debate clause*. Recognition of such a privilege is particularly appropriate because it would reflect the complexity of modern government and acknowledge that a United States senator may utilize private parties as well as congressional employees in the discharge of his functions. And in the case of either employees or private parties their conduct is presumptively protected. *Dombrowski v. Eastland*, 387 U.S. 82, 85.

Conclusion

In No. 71-1026 the judgment should be affirmed.

In No. 71-1017 the judgment should be reversed with directions to the court of appeals to prohibit any interrogation of Senator Gravel or those with whom he dealt in publication of the Pentagon Papers.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1017 and 71-1026

HON. MIKE GRAVEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

[No. 71-1017]

UNITED STATES OF AMERICA,

Petitioner,

v.

HON. MIKE GRAVEL,

Respondent.

[No. 71-1026]

On Writs of Certiorari to the United States Court of
Appeals for the First Circuit

**BRIEF OF DR. LEONARD S. RODBERG
AS AMICUS CURIAE**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1017 and 71-1026

HON. MIKE GRAVEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

[No. 71-1017]

UNITED STATES OF AMERICA,

Petitioner,

v.

HON. MIKE GRAVEL,

Respondent.

[No. 71-1026]

**On Writs of Certiorari to the United States Court of
Appeals for the First Circuit**

**BRIEF OF DR. LEONARD S. RODBERG
AS AMICUS CURIAE**

Interest of *Amicus Curiae*¹

This litigation began with Dr. Leonard S. Rodberg's motion to quash a subpoena which sought to compel his appearance before a grand jury in the District of Massachusetts. Subsequently, the government caused subpoenas to be served upon other persons whom it apparently sought to question about his and other persons' activities. Thus Dr. Rodberg has been drawn into this litigation both as a witness before the grand jury and as a subject of its inquiry. As the outcome of these cases will determine in large measure the protection to which he is entitled as a legislative aide of Senator Gravel with respect to the grand jury inquiry herein involved, Dr. Rodberg seeks to submit this *amicus* brief.²

Statement of the Case

Since June 29, 1971, Dr. Leonard S. Rodberg has been a legislative assistant to Mike Gravel, United States Senator from Alaska. On the evening of August 24, 1971, he was served at his home in Silver Springs, Maryland, with

¹ Counsel for the government and for Senator Gravel have each agreed to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court.

² Technically, insofar as the government's appeal is an appeal from the protective order entered by the District Court, Dr. Rodberg is a party to this proceeding. (Had Senator Gravel not intervened, Dr. Rodberg would plainly have been the appellee in the case of the government's appeal from that protective order. The Senator's intervention does not affect Dr. Rodberg's status in this regard.) However, since the Senator has intervened and Dr. Rodberg is in any event submitting this brief and because he is not seeking oral argument, we do not press the point.

a subpoena which sought to compel his appearance on the morning of August 27 before a federal grand jury sitting in the District of Massachusetts. It was widely known that the Department of Justice was and is conducting an investigation before this grand jury with respect to the so-called "Pentagon Papers." The subpoena was served by FBI agents on the same day a lengthy article had appeared in *Boston After Dark*, a weekly newspaper, alleging that Dr. Rodberg had sought, on Senator Gravel's behalf, to arrange publication of the Pentagon Papers which, on June 29, 1971, the Senator had inserted into the Record of the Subcommittee on Public Buildings and Grounds, a subcommittee of the Senate Committee on Public Works.³ A similar article had appeared six days earlier, August 18, in the *Washington Post*.⁴

Dr. Rodberg (and Senator Gravel, whose motion to intervene was granted by the District Court) moved to quash the subpoena on the ground, *inter alia*, that questioning him before the grand jury with respect to the matters contained in the two newspaper accounts would violate the doctrine of separation of powers and legislative privilege. In a "Memorandum of Decision and Protective Order" the District Court (Hon. W. Arthur Garrity, Jr.) denied the motion but entered a protective order pursuant to the Speech or Debate Clause limiting the scope of the inquiry.⁵ Senator Gravel, as intervenor,

³ Burlingame, "Why M.I.T. And Harvard Suppressed The Pentagon Papers."

⁴ Clawson, "Senator Gravel To Publish War Papers."

⁵ *United States v. Doe, In re Rodberg*, 332 F.Supp. 930 (D. Mass., 1971). The protective order read as follows:

(Footnote continued on following page)

appealed the denial of the motion to quash and the government cross-appealed from the protective order.

The government also caused a grand jury subpoena to be served upon Howard Webber, director of Massachusetts Institute of Technology Press (hereinafter M.I.T. Press). Mr. Webber had been named in the *Boston After Dark* article as a person Dr. Rodberg had attempted to interest in the publication of the Pentagon Papers that Senator Gravel had earlier inserted into the Subcommittee Record. The Senator successfully intervened with respect to the Webber subpoena⁶ and prayed for relief with respect to it and other subpoenas directed at third parties whom the Justice Department might want to question with respect to Senator Gravel's activities.⁷ When

(Footnote continued from preceding page)

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor about things done by the Senator in preparation for and intimately related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971, after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting.

⁶ The motion to intervene was granted on October 24, 1971.

⁷ Subsequently the Justice Department caused a subpoena to be served upon Gobin Stair, director of Beacon Press in Boston, Massachusetts. Beacon Press has published *The Senator Gravel Edition of the Pentagon Papers: The Defense Department History of Decision Making on Vietnam*.

the District Court denied further relief on October 28, 1971;⁸ an immediate appeal was taken by Senator Gravel. The Senator's two appeals and the government's cross-appeal were consolidated and heard on an expedited schedule.⁹

On January 7, 1972, the Court of Appeals issued its judgment and opinion which, in essence, broadened slightly the protective order entered by the District Court but otherwise denied Senator Gravel further relief.¹⁰ By or-

⁸ The Court did stay enforcement of the Rodberg and Webber subpoenas for ten (10) days to allow application to the appellate court for further relief. And on the following day, a supplemental protective order was entered, also for ten (10) days, prohibiting the questioning of any grand jury witness "about Senator Mike Gravel's conduct in arranging for the private publication of the Pentagon Papers nor about Dr. Leonard S. Rodberg's conduct in arranging for said publication to the extent that what he did was in his capacity as a member of the Senator's personal staff."

⁹ The Court of Appeals, by order of October 29, 1971, stayed all proceedings before the grand jury. That stay was modified on November 29 when the Court of Appeals ruled "that the grand jury may pursue its inquiry into crimes relating to the so-called Pentagon Papers, provided that neither Senator Mike Gravel or any member of his staff or of the staff of the Subcommittee on Buildings and Grounds shall be subpoenaed to testify, and no witness shall be questioned concerning the acquisition, use, publication, or republication of the Pentagon Papers by Senator Mike Gravel or by any member of the staff as above defined, until further order of this Court."

¹⁰ *United States v. Doe*, Nos. 71-1331, 71-1332, 71-1335 (1 Cir., 1972). The pertinent part of the judgment read:

The orders of the District Court of October 28, 1971, are affirmed, except that the Protective Order of that date is modified to read as follows:

(Footnote continued on following page)

der and opinion dated January 18, that Court denied a petition for rehearing, although clarifying and amending in part its rulings of January 7.¹¹ Further, the Court amended its stay order of November 29 (see footnote 9) to conform to its opinion and judgment of January 7, as clarified on January 18. The amendment and substitution were, in turn, temporarily stayed to permit application to the Circuit Justice. Application to Mr. Justice Brennan for a stay of the mandate was duly made and on January 24, 1972, Justice Brennan granted that stay, leaving in effect the order entered by the Court

(Footnote continued from preceding page)

(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions while being interviewed for, or, after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment.

¹¹ The Court ordered that after the words "his own actions," see footnote 10, the phrase, "in the broadest sense, including observations and communications, oral or written by him, or coming to his attention," should be added.

7
of Appeals on November 29.¹² Senator Gravel's petition for writ of certiorari was filed in conformity with the schedule ordered by Justice Brennan. That petition (in No. 71-1017) and the government's cross-petition (in No. 71-1026) were granted on February 23, 1972, and the cases consolidated. On March 6, this Court granted the motion to expedite briefing and oral argument.

Summary of Argument

These cases lie in the mainstream of history, reflecting the struggle between the legislative and executive branches of government. This conflict, having its origins in the English struggles between the Crown and the Parliament, was of great concern to the Founding Fathers. To protect the independence and integrity of the legislature, they therefore provided in our Constitution that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

The Speech or Debate Clause has never been interpreted literally. In the first case in this Court involving the

¹² "Upon consideration of the application of counsel for petitioner,

It is ordered that the stay of the mandate in Cases No. 71-1331, 71-1332 ordered by the United States Court of Appeals for the First Circuit dated January 18, 1972, be, and it is hereby, continued until February 10, 1972.

However, if the petition for a writ of certiorari is filed on or before February 10, 1972, the stay is to remain in effect pending disposition of the case in this Court or until further order.

Due to the shortness of time, the printing of both the petition for a writ of certiorari and the brief in opposition is not initially required."

Clause, it was held to extend to things "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). Extending to all acts "within the sphere of legitimate legislative activity," *Tenney & Brandhove*, 341 U.S. 367, 376 (1951), the constitutional provision should be "read broadly to effectuate its purposes." *United States v. Johnson*, 383 U.S. 169, 180 (1966). It encompasses not only the insertion of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds, but includes as well the subsequent efforts by and on behalf of Senator Gravel to publish the Papers to make them available generally to the American citizenry. Publication of materials of public importance which have been placed in the record of Congress or one of its committees or sub-committees is a legislative activity commonly effected by many members of Congress. Such publication is in furtherance of the legislative function of informing the citizenry of facts critical to an informed view on matters of public significance.

The precedents expressly recognize that contemporary government is sufficiently complex that there must of necessity be a delegation and redelegation of governmental functions. Accordingly, the legislative privilege extends beyond legislators to those persons whose assistance is required to fulfill legislative responsibilities and prerogatives. Specifically, it includes personal aides like Dr. Leonard S. Rodberg, who act on behalf of a legislator and solely at his direction. It also extends to third parties who fulfill the same role and whose assistance is indispensable to the accomplishment of legislative functions. In the context of these cases, this would include a publisher of Senator Gravel's multi-volume copy of the

Pentagon Papers. This standard protects those personal assistants and third persons who act, in effect, as an extension of the legislator; it leaves with no immunity those who act substantially on their own and those third persons who are not essential to the legislative process.

Applied to the instant facts, the principles enunciated above mandate the conclusion that no witness before the grand jury may be questioned with respect either to the insertion of the Papers into the Subcommittee record or with respect to their subsequent publication generally. The Speech or Debate Clause acts not merely to preclude criminal prosecution but criminal inquiry in the grand jury. It extends to any action by the executive or judiciary which inhibits a vigorous and independent legislature; secret questioning of persons before the grand jury with respect to persons and matters protected by the Clause may deter vigor and independence just as much as prosecution. This Court has so concluded in the analogous First Amendment cases holding that deterrence of protected activity may be effected by investigatory interrogation, unaffected by the possibility of prosecution.

Finally, the Speech or Debate Clause bars inquiry of Senator Gravel directed at the source of his copy of the Pentagon Papers. Such protection is necessary to insure the access to facts imperative to full and free legislative debate. It must extend as well to Dr. Rodberg.

A R G U M E N T

The Speech or Debate Clause Proscribes any Investigation in a Grand Jury Proceeding of Matters in the Sphere of Legitimate Legislative Activity.

- A. The conflict here presented between the Executive and the Legislature is the very struggle which lead the Founding Fathers to include the Speech or Debate Clause in our Constitution.**

This Court has counseled that it will "look particularly to the prophylactic purposes of the [Speech or Debate] clause," *United States v. Johnson*, 383 U.S. 169, 182 (1966), and "read it broadly to effectuate its purposes." *Id.* at 180. That admonition has special force in the light of the circumstances here presented. These cases involve an attempt by the executive branch of government to conduct an investigation into the obtaining by a United States Senator of a copy of the Pentagon Papers, documents which are highly critical of and a source of embarrassment to the executive branch, his insertion of those Papers into the record of a Senate Subcommittee and his efforts to publish the Papers so as to make them widely available to his constituents and to the American public generally.¹³ The parallel between

¹³ The instant investigation was not commenced by a grand jury on its own. It was begun only after an Oath of Office of a government attorney was filed with the Clerk of the District Court which authorized him "to assist in presentation to the grand jury and trial of the case or cases in the District of Massachusetts in which the Department is informed that various persons have violated in the District of Massachusetts the laws relating to the retention of pub-

(Footnote continued on following page)

the facts of these cases and the historical and contemporary function of the Speech or Debate Clause is at once apparent and striking.

The present effort to question in the grand jury forum a member of the staff of a United States Senator and third parties about legislative activities raises the most profound questions going to the heart of our constitutional government. From our earliest days it has been recognized that in its own sphere each branch of government is supreme and need not, indeed must not, be held accountable to its coordinate branches with respect to activities within that sphere. In *The Federalist Papers*, No. 48, Madison wrote:

"It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overriding influence over the others in the administration of their respective powers.

(Footnote continued from preceding page)

lie property or records with intent to convert (18 U.S.C. 641); the gathering and transmitting of national defense information (18 U.S.C. 793), the concealment or removal of public records or documents (18 U.S.C. 2071), and conspiracy to commit such offenses, and to defraud the United States (18 U.S.C. 371)." A special grand jury, see 18 U.S.C. §1331, was convened as a result of the filing of this oath. The investigation before it has been conducted not by local United States attorneys, as is the case with most grand juries, but by attorneys specially assigned for purposes of this investigation to the Internal Security Division of the Justice Department.

It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it."

Madison wrote against the background of English history. The legislative privilege contained in the English Bill of Rights of 1689 "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution . . . the privilege has been recognized as an important protection of the independence and integrity of the legislature." *United States v. Johnson*, 383 U.S. 169, 178 (1966) (footnote omitted). See also 383 U.S. at 181.

Shortly after the enactment of our Constitution, in *Hayburn's Case*, 2 Dall. 408, 409 (1792), in one of its earliest decisions, this Court quoted the Circuit Court in that case (which had included Chief Justice John Jay): "[B]y the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and . . . it is the duty of each to abstain from, and to oppose, encroachments on either." See also *Kilbourn v. Thompson*, 103 U.S. 168, 190-191 (1881). This most basic principle of separation of powers finds expression in part in Article I, Section 6, Clause 1 of our Constitution, which provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

We submit that no case which has come before this or any other American court has ever posed so boldly

the threat to the interests that underlie the Speech or Debate Clause and the separation of powers that is here presented. In the long history of our Nation, this Court has had only six cases directly implicating this provision. But while those (and the analogous cases dealing with judicial and executive immunity) provide legal principles and analysis which are helpful in resolving the issues here posed, none on the facts resemble the instant case. *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); and *Powell v. McCormack*, 395 U.S. 486 (1969), were each civil actions brought by private individuals. While a reason for enactment of the Clause was to prevent the subjection of legislators "to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader," *Tenney v. Brandhove*, *supra* at 377, this Court has recognized explicitly that its primary purpose was not to prevent private civil actions but to guard against encroachment by the other coordinate branches of government. Only six years ago, in *United States v. Johnson*, 383 U.S. at 180-181, this Court said:

"[I]t is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary."

Nor do *Johnson*, *supra*, or *United States v. Brewster*, No. 70-45 (pending) bare much similarity to the instant facts. Both involve criminal prosecutions for alleged of-

fenses unrelated to any conflict between the executive and the legislative branches.¹⁴

The instant matter presents the first example in American history to reach this Court of the case to which the Speech or Debate Clause was truly meant to apply. As few other disclosures ever have, the publication of the Pentagon Papers reveals that the American people have been continuously and consistently misled by the executive branch of government with respect to American participation in the war in Southeast Asia, a discredited war now universally perceived as a national disaster. They demonstrate that the national executive misled the American people and the Congress as to the facts of the war and the true motivations behind American decision-making. The Pentagon Papers are thus a source of ultimate embarrassment to the executive branch, drawing into sharp question, as they do, its basic integrity.

The effort of the Justice Department to investigate, through the employ of a judicial proceeding, the efforts of a United States Senator and his staff to make these documents widely available to his constituents and to the American citizenry generally, flies directly in the face of English and American history. It contradicts the very point of the Speech or Debate Clause and ignores the circumstances which called it into being. For as this Court has recognized, the purpose of that constitutional provision was to protect legislators who had evinced

¹⁴ Johnson was charged with conflict of interest and conspiracy to defraud the United States. The gravamen of the offense was that he had taken a bribe to obtain the dismissal of federal charges pending against a loan company and its officers. Similarly, Brewster has been indicted for accepting bribes in exchange for the exertion of his influence as a Senator.

criticism of the executive from harassment, intimidation or retaliation by the executive. See *United States v. Johnson*, *supra* at 178, 181-183; *Powell v. McCormack*, *supra* at 502. It was, as James Wilson wrote, explicitly intended to protect the ability of the legislator to perform his constitutional responsibilities free "from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense."¹⁵ The "resentment" of the Executive, "however powerful" he may be, directed at the activities of a Senator who by seeking to "bare the secrets of government and inform the people," *New York Times v. United States*, 91 S.Ct. 2140, 2143 (1971) (Black, J., concurring) has "occasion[ed] offense" is the very thing against which the Speech or Debate Clause was meant to guard.

B. Senator Gravel's insertion of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds and his subsequent effort to publish those Papers are matters within the sphere of legitimate Legislative activity.

We need not discuss at any length Senator Gravel's insertion of his copy of the Pentagon Papers into the record of the Subcommittee on Public Buildings and Grounds. That action (and any action preparatory thereto) is obviously "related to the due functioning of the legislative process." *United States v. Johnson*, *supra* at 172. See *Kilbourn v. Thompson*, 103 U.S. at 204. Congressional subcommittees and activities therein are the

¹⁵ 1 The Works of James Wilson (R. McCloskey ed., 1967), p. 421, quoted with the approval in *Tenney v. Brandhove*, 341 U.S. at 373. Wilson was an influential member of the Committee of Detail which was responsible for the inclusion of the Clause in the Constitution.

essence of the legislative process. To hold that things generally said or done in the meetings of such subcommittees, specifically the makings of oral statements and the insertion of written material into the record, are not protected, would entirely subvert the Speech or Debate Clause.¹⁶

Furthermore, that constitutional provision is to "be read broadly to effectuate its purposes." *United States*

¹⁶ In light of the government's claim that the Pentagon Papers are irrelevant to the subject matter within the jurisdiction of the Subcommittee on Public Buildings and Grounds, we would point out that the constitutional protection is not defeated by a claim of irrelevancy. Cf. *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), quoted with approval in *Tenney v. Brandhove*, *supra* at 373-374. However, we must note our strong disagreement with this allegation (and with the Court of Appeals' acceptance of it). One of the prime evils of the war conducted by the United States abroad has been the effect of that war upon our nation at home. Putting to one side the moral impact of American conduct in Southeast Asia, it is widely acknowledged that the war has had a tremendous effect upon the economic status of the United States. Not only is the continuing inflation attributable in part to the war but the billions and billions of dollars expended on the war have clearly deprived domestic programs of desperately needed funds. Indeed, this very point has been made over and over again in Congressional debates over appropriations bills in the last several years. It has been one of the major factors contributing to the overwhelming opposition to the war among the American people. Since the war has played such a dominant role in the draining off of funds from domestic programs, the moral, military and political incorrectness of that war, as explicated in the Pentagon Papers, is certainly relevant to a discussion of the need and justification for greater appropriations for domestic programs. This was the very point Senator Gravel made at the outset of the Subcommittee meeting of June 29. Any claim that the continued incalculable economic costs of the war do not affect domestic economics can only be made if one ignores the plain realities of the day.

v. Johnson, op. cit. It cannot and has not been limited to activities such as those occurring at the June 29 meeting of the Subcommittee on Public Buildings and Grounds. That it is not to be literally interpreted was authoritatively settled in the very first case involving that provision to come to this Court. In *Kilbourn v. Thompson, supra* at 203-204, the Court quoted at length and with approval from the early American case of *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), where a unanimous court said of the legislative privilege:

"These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution; for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber."

Concluding that "[i]t would be a narrow view of the constitutional provision to limit it to words spoken in debate," this Court determined that it protected all "things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204.

In the next two cases involving the Speech or Debate Clause, this Court restated the scope of that provision. In *Tenney v. Brandhove*, it was defined as anything "in the sphere of legitimate legislative activity." 341 U.S. at 376. In *United States v. Johnson*, the Clause was said to extend to all those matters that "related to the due functioning of the legislative process." 383 U.S. at 172.

We submit that the efforts by and on behalf of Senator Gravel to publish the Pentagon Papers earlier inserted into the record of the Senate Subcommittee on Public Buildings and Grounds constitutes legislative activity protected by the Constitution as defined in *Kilbourn*, *Tenney* and *Johnson*. Such a conclusion is impelled by the principles of our government and by the realities of the legislative process.

In a democratic system of government the roles of citizens and elected representatives are complementary. The latter represent the views of the former on matters of public importance. The citizen has the responsibility of informing the representative of his views. Presupposed is that the citizen is sufficiently educated about an issue so that his opinion may be an informed one. Here, the representative plays a second role—that of providing the citizen with information which will enable him to have an informed view on the subject at hand. Not only is this responsibility important in the general sense, but often times the representative may be able to provide informa-

tion to the citizenry that might otherwise be unavailable to it.

In the instant matter, Senator Gravel has sought to fulfill this informing function. He has sought to make widely available to the public information which deals with the most important issue of our time.¹⁷ He has acted solely in his capacity as Senator,¹⁸ seeking to inform the public of facts crucial to an informed view on the war in Southeast Asia. His actions "[i]n bar[ing] the secrets of government and inform[ing] the people," *New York Times v. United States*, *op. cit.* (Black, J., concurring) surely are, therefore, "related to the due functioning of the legislative process." *United States v. Johnson*, *op. cit.*

In *Kilbourn v. Thompson*, the standard employed to describe constitutionally protected conduct was, as we have noted, "things generally done in a session of the House by one of its members in relation to the business before it." 103 U.S. at 204. Making available to constituents written accounts of matters of the greatest public import which have earlier been inserted into the record of Congress or a Congressional committee or subcommittee satisfies that criterion. It is commonplace for legislators to

¹⁷ Only parts of the so-called Pentagon Papers were previously available to the public. Various newspapers had published small excerpts in June and July, 1971. Later the New York Times published in paperback a drastically abbreviated account. The Government Printing Office has since made available (at a price of \$50) a censored version of the Papers. Senator Gravel's edition, published by Beacon Press, is uncensored and available for \$20.

¹⁸ Senator Gravel derives no financial benefits from the Beacon Press publication or from the sale of that publication.

inform their constituents through written reports, speeches, etc. of matters that have arisen in the Congress and about which the citizenry should know. Some members of Congress have television shows on local stations for the purpose of discussing the issues of the day and informing the public. These activities are not at all unusual in modern legislative process.¹⁹ For these reasons, then, Senator Gravel's efforts to publish the Pentagon Papers are protected by the Speech or Debate Clause.

The Court of Appeals conceded that publication of matters inserted into the record of Congress "may be customarily done by members of Congress . . ." (Pet. for Writ of Certiorari in No. 71-1017, p. 9A). Neverthe-

¹⁹ Indeed, they are even more commonplace in the executive branch. The President regularly goes on nationwide television to inform the public of a Presidential trip abroad, a new economic policy, proposed legislation to halt busing of public school children, or new "Vietnamization" plans. We doubt the executive would contend that the President's activities in informing the public in this regard of matters of public importance is not in the sphere of legitimate executive activity or not related to the due functioning of his administration or not generally done by him in relation to executive business.

Moreover, we are concerned here with information already inserted into the record of a Senate subcommittee. Certainly it cannot be suggested that the sending to constituents of material in the records of Congress is not or has not been an every day legislative activity. In fact, it is so "generally done in a session of the [Congress] by . . . its members in relation to the business before it," *Kilbourn v. Thompson*, *op. cit.*, that such material is mailed by virtue of the Congressional franking privilege. Publication of the Pentagon Papers through Beacon Press is no different, in terms of the Speech or Debate Clause, than publication of the Papers through invocation of the franking privilege.

less, it determined that such publication was not protected legislative activity. The Court based its conclusion on two early English cases, and the belief that the privilege has been applied beyond Congressional debate "only when necessary to prevent indirect impairment of such deliberations." *Id.* It also relied upon a decision of the New York Court of Appeals holding that a judge had no privilege to arrange circulation of a calumnious opinion.

As to the English cases, we need only note that they no longer represent the law, having been disapproved in subsequent decisions. Compare *Rex v. Creevey*, 1 Maule & Selwyn 273 (1813) and *Rex v. Lord Abington*, 1 Esp. N.P. Cases 228 (1795), the cases cited by the Court of Appeals, with the later decisions in *Davison v. Duncan*, 7 E. & B. 229, 233, 119 Eng. Rep. 1233, 1234 (1857) and in *Wason v. Walter*, 4 L.R.Q.B. 73 (1868). Cf. *Rex v. Wright*, 8 T.R. 293, 101 Eng. Rep. 1396 (1799).

The claim that the constitutional provision should only apply to activities other than speech or debate when necessary to prevent indirect abridgement of speech or debate is a conclusion which begs the issue and one which suggests a return to the narrow, nearly literal interpretation of the constitutional provision which this Court has expressly rejected. *Kilbourn v. Thompson*, *supra* at 204. Moreover, it conflicts with the decision in *Kilbourn v. Thompson*, *supra* and with *Coffin v. Coffin*, *op. cit.*, and *United States v. Johnson*, *supra*. *Coffin* plainly envisaged what this Court expressly found in *Johnson*: that the Speech or Debate Clause "should be read broadly to effectuate its purposes." 383 U.S. at 180. And *Kilbourn* held that the act of voting, *inter alia*, was protected, an action the protection of which is not necessary to prevent indirect abridgement of pure speech or debate.

The standard adopted by the court below finds no support in the decisions of this or any other court. If a given act is "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson*, *op. cit.*, i.e., is "in the sphere of legitimate legislative activity," *Tenney v. Brandhove*, *op. cit.*, and is "related to the due functioning of the legislative process," *United States v. Johnson*, *op. cit.*, it should be held within the "outer perimeter," *Barr v. Matteo*, 360 U.S. 564, 575 (1959), of the Speech or Debate Clause. No sound reason for a contrary conclusion suggests itself.

Finally, the decision of the New York Court of Appeals in *Murray v. Brancato*, 290 N.Y. 52, 48 N.E.2d 257 (1943), relied upon by the court below, is readily distinguishable. The act of arranging for distribution through private channels of an allegedly defamatory opinion, the act involved there, is simply not legitimate judicial activity. The function of the judicial branch is severely circumscribed, consisting only of the resolving of "cases or controversies." The act of arranging for private distribution of a judicial opinion is unnecessary, indeed unrelated, to the performance of that function. This, in fact, was the precise basis for the New York decision. Because, as we have seen, the legislative function is considerably broader than the judicial, *Murray* adds nothing to the government's case here.

C. In order to make the Legislative Privilege meaningful, Legislative Assistants or other persons acting at the direction and on behalf of a Legislator in the sphere of legitimate Legislative activity are likewise entitled to protection under the Speech or Debate Clause.

To vigorously and successfully fulfill the responsibilities of representative government, legislators must necessarily have the assistance of staff personnel and third persons. As this Court said in *Barr v. Matteo*, 360 U.S. 564, 573 (1959): "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions." The complexities of modern government mandate this aid for numerous purposes: the typing and completion of correspondence with constituents, other legislators and persons in the executive branch, the drafting of speeches and of proposed legislation, the becoming familiar with the legislative proposals of others, so as to be able to debate and discuss them intelligently and to cast a responsible vote. Every aspect of the legislative function merits, nay requires, this assistance. Just as judges need law clerks to help in performing the judicial function, so too legislators need help in performing the legislative function.²⁰ This reality is reflected in the fact that today every Senator and Representative has a personal staff, each of which plays an indispensable role. It should also be recognized that as-

²⁰ Cf. *Cooper v. O'Connor*, 99 F.2d 135, 142 (D.C.Cir., 1938), recognizing the imperative of the delegation of governmental responsibilities. See also *United States v. Kovel*, 296 F.2d 918, 921 (2^d Cir., 1961), where the Court of Appeals, per Judge Friendly, noted that "the complexities of modern existence" require that attorneys delegate substantial portions of their obligations to aides.

sistance comes also from third parties. For example, an expert on a given subject, such as an attorney or college professor, may be asked to draft legislation or may be consulted on a given subject. A printer may be used to print letters to constituents.

In each case, these persons, while not themselves legislators, are indispensable to the performance of legislative functions. When such persons act at the behest of a Senator or Representative "in the sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S. at 376, they must be afforded the same constitutional protection afforded the legislator. To hold otherwise would severely dilute the protection of the legislator, his ability to exercise his constitutional responsibilities. If legislative aides and others who enable the Senator or Representative to fulfill his legislative role are not protected under the Speech or Debate Clause, they will naturally be deterred in their willingness to assist the Senator or Representative. Without the assurance that in aiding the performance of "legitimate legislative activity," *Tenney v. Brandhove*, *supra* at 376, they come within the meaning and scope of the legislative privilege, such persons will not be willing to aid that performance. Since, as we have seen, such assistance is absolutely essential, the inevitable consequence will be an inability on the part of the legislator to perform his constitutional obligations. Since a legislator acts not for himself but for the people the harm is not to the individual but to representative government.

This Court has had only three cases involving the possible application of the Speech or Debate Clause to legislative aides. Nothing in any of the three indicates that such aides are not within the constitutional protection

when "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, *op. cit.*

Kilbourn v. Thompson, 103 U.S. 168 (1881), involved a suit for false imprisonment against individual Representatives and the House Sergeant-at-Arms. This Court held that the Sergeant-at-Arms was liable for damages but not the Representatives. Two points were critical in the Court's reaching this conclusion. The first is that the effort to compel Kilbourn to answer questions posed by a House Committee and to produce documents was beyond the authority of the House.²¹ Thus, this Court found that the imprisonment of Kilbourn, which was the specific wrong sought to be remedied by the suit, did not constitute "legitimate legislative activity." *Tenney v. Brandhove*, *supra*. Allowing recovery against the Sergeant-at-Arms, who was the person who actually imprisoned Kilbourn, could not therefore conflict with the Speech or Debate Clause. Indeed, this Court dismissed the action against the Representatives themselves only after finding specifically that "these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him." 103 U.S. at 200. The plain implication was that they would have been held liable if they had. But the Representatives' only involve-

²¹ "We are of the opinion, for these reasons, that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution; that the Committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without lawful authority." *Id.* at 196. See also *id.* at 192.

ment in the affair consisted of their reporting to the House that Kilbourn had failed to comply with the committee's subpoena, offering a resolution to the House with respect to the matter and voting on that resolution; each something "generally done in a session of the House by one of its members in relation to the business before it."

103 U.S. at 204. As the actions of each of the Representatives, unlike those of the Sergeant-at-Arms, therefore constituted "legitimate legislative activity," each was fully protected by the Speech or Debate Clause.

In *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the Chairman and counsel of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate were sued for alleged conspiracy and concert of action with Louisiana officials to seize property and records of petitioners by unlawful means in violation of plaintiffs' Fourth Amendment rights. In reversing that part of the Court of Appeals decision which had upheld summary dismissal of the action as to the Subcommittee counsel, Sourwine, the Court specifically relied upon the petitioners' claim "that respondent Sourwine actively collaborated with counsel to the Louisiana committee in making the plans for the allegedly illegal 'raids' pursuant to the claimed authority of the Louisiana committee and on its behalf, in which petitioners claim that their property and records were seized in violation of their Fourth Amendment rights." *Id.* at 84. This activity would obviously not constitute "legitimate legislative activity," and it was on this basis that the Court decided that the plaintiffs were entitled to go to trial. Furthermore, this Court specifically held that the Speech or Debate Clause was applicable to legislative employees. *Id.* at 85. In fact, in concluding that Sourwine might be liable in damages, the Court specifically discounted reliance upon "that part of

petitioners' claims which related to the take-over of the records by respondents *after* the 'raids.'" *Id.* at 83-84. By so doing this Court plainly indicated its agreement with the Court of Appeals in that case that these latter allegations involved "legitimate legislative activity" and suit solely on the basis of these claims was therefore barred both as to Senator Eastland and as to Sourwine.

Finally, in *Powell v. McCormack*, 395 U.S. 486 (1969), this Court held that issuance of a declaratory judgment against the House Sergeant-at-Arms, Clerk and Door-keeper that Congressman Powell had been unlawfully excluded from his House seat was not barred by the Speech or Debate Clause. This was merely an application of the rule first enunciated in *Kilbourn*: while the participation of the Representatives in excluding Powell may have constituted "legitimate legislative activity,"²² the (threatened) actions of the employees in actually excluding Powell, as distinguished from the Representatives' acts of voting to exclude, did not constitute "legitimate legislative activity," since as the Court concluded, the House had exceeded its constitutional authority in refusing to seat Powell.

Thus even in civil contexts not involving the separation of powers considerations that lie at the heart of the Speech or Debate Clause, this Court has never indicated that a legislative aide may not be entitled to the protection of the Clause. Indeed, in *Dombrowski v. Eastland*,

²² In fact, this Court specifically left this question open. 395 U.S. at 501-502. It also left open the question whether the fact that the declaratory judgment was non-coercive relief and thus in reality no real deterrence to the vigorous performance of activities "related to the due functioning of the legislative process," *United States v. Johnson, supra*, removed the bar of the Speech or Debate Clause.

supra, at 85, this Court held that such persons were entitled to constitutional protection.^{22a}

Such a conclusion is further supported by the decisions of this and lower courts dealing with the analogous executive privilege. In *Barr v. Matteo*, 360 U.S. 564. (1959), the Court held that an acting director of the Office of Rent Stabilization was absolutely immune from suit for alleged libel contained in a press release issued by him despite an allegation of malice. The Court relied upon the analogous decisions in *Yaselli v. Goff*, 12 F.2d 396 (2 Cir., 1926), *aff'd per curiam*, 275 U.S. 503 (1927) and *Spalding v. Vilas*, 161 U.S. 483 (1896). After discussing the latter case, in which the Postmaster General was found absolutely immune from suit for activity within the scope of his authority, this Court said:

"We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Supra* at 573.

^{22a} What emerges from a careful reading of *Kilbourn*, *Tenney* and *Dombrowski* is the drawing of distinctions between legitimate and illegitimate legislative activity, rather than between legislators and legislative aides.

Contemporaneously with *Barr*, this Court held that the commander of the Boston Naval Shipyard was immune from suit for defamation for having sent copies of a report he drew up for two Navy superiors to the Congressional delegation from the State of Massachusetts. *Howard v. Lyons*, 360 U.S. 593 (1959). Finding that the sending of the report was in the discharge of the Commander's official duties, this Court applied the principle enunciated in *Barr* that subordinates of the Executive are likewise protected by the executive privilege. Lower federal courts have also extended protection to governmental employees. In addition to *Cooper* and *Yaselli, op. cit.*, see, e.g., *Bershad v. Wood*, 290 F.2d 714 (9 Cir., 1961), and the decisions cited in footnote 9 of *Barr v. Matteo, supra* at 572.

Certainly there is no basis for not applying *Barr, Howard, et al.*, to legislative employees. It cannot be gainsaid that there must of necessity be a delegation and redelegation of responsibility in the legislative sphere, if an individual legislator is to function effectively. If, then, as this Court said, the policy behind a governmental privilege is "to aid in the effective functioning of government," *Barr v. Matteo, op. cit.*, the privilege must be applied to subordinates in the legislative branch as well as in the executive.

Dr. Rodberg is presently and has been since June 29, 1971, a staff assistant to Senator Gravel. He was engaged as such precisely for the reasons that make such persons indispensable to the legislative process—he possessed abilities and expertise beyond that of the Senator with respect to particular subject matter of public concern. He could therefore be of substantial assistance to the Senator with respect to the latter's legislative activi-

ties involving that subject matter.²³ It should be noted that the individuals protected in *Barr and Howard* were

²³ Dr. Rodberg's scientific and academic credentials are extensive. See paragraphs 2 and 3. of his affidavit submitted in the District Court. It should be noted that other Congressmen have, on other occasions, availed themselves of his expertise. As Dr. Rodberg explained in paragraphs 4-6 of his affidavit:

"Since 1966, I have been sought out by a number of members of Congress for advice and suggestions concerning 'ABM, arms control, the military budget, military policy, economic conversion, how to study and evaluate military organizations and policies, United States policy in Vietnam, and new economic priorities.

In the summer of 1969, I was asked to organize a Congressional conference sponsored by more than fifty Senators and Congressmen, on 'Planning for New Priorities. I organized, participated in and spoke at that two day conference which was held in the Senate Office Building during June, 1969. After consultation with and under the direction of, some of these Congressmen, I secured the participation of approximately fifteen academic experts in foreign and military policies and economics. Press reports were issued on the conference by the Congressional sponsors; newsmen were present and reported on the proceedings.

On another occasion, at the request of the sponsoring Congressmen, I spoke at and participated in, and drafted the report for another Congressional conference, which report was subsequently published by the sponsoring Congressmen.

In 1969 I wrote a chapter in a book commissioned by Senator Edward Kennedy, entitled, 'ABM: An Evaluation of the Decision to Deploy an Anti-Ballistic Missile System' (Harper and Row). Senator Kennedy wrote the introduction to this book. My chapter was entitled 'ABM Reliability'.

In April, 1971 I helped to organize, participated in, spoke at and wrote the report of the Conference on Economic Conversion sponsored jointly by a number of Congressmen and public organizations. In the course of this activity I worked closely with a num-

(Footnote continued on following page)

low level governmental personnel acting on their own initiative. By contrast, Dr. Rodberg is a personal aide to Senator Gravel, accountable only to him. His actions on behalf of the Senator have been taken solely at the latter's direction. Thus, his is a much stronger case warranting the protection of a privilege. Especially is this so where the legislative privilege is embodied in the commands of a specific constitutional provision, the Speech or Debate Clause, whereas the doctrine of executive privilege is, admittedly, "of judicial making." *Barr v. Matteo*, *supra* at 569.²⁴

Similarly, those third persons who participated in Senator Gravel's effort to publish the Pentagon Papers in

(Footnote continued from preceding page)

ber of aides to individual Congressmen. The report of the Conference has been published by the Coalition on National Priorities and has been distributed to members of Congress and interested members of the public.

Since 1967 I have been on the executive committee of the Federation of American Scientists (hereinafter FAS). FAS is a non-profit organization of scientists and engineers concerned with the impact of science on public affairs. As an executive committee member of FAS, I participate in developing policy positions by preparing expert analyses of issues under consideration based on my special background and access to information. In 1968, I submitted written testimony on behalf of FAS to the House Armed Services Committee. The positions taken by FAS have in the large been opposed to official administration policy. As the only member of the executive committee resident in Washington, I have discussed FAS positions and expert analyses with members of Congress, often at their request."

²⁴ The analogous doctrine of judicial immunity too has its roots in the common law rather than the Constitution. *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967); *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872).

serted into the Subcommittee record must also be protected. While not on the personal staff of the Senator, their assistance is no less indispensable. A legislator does not have the practical or financial resources necessary to publish generally a multi-volume work on American decision-making in Southeast Asia. Manifestly a publishing house is required if such an undertaking is to be fulfilled. It would make little sense to hold that the Senator has an absolute right to publish the Pentagon Papers but to then say that those whose assistance is imperative are not similarly protected. If those whose aid is essential to the performance of legitimate legislative activity are not protected they simply will not agree to help. The result would be that the Court will have provided a legislator with a right but denied him the sole means of effectuating that right.

We wish to emphasize that we are not suggesting that anything done by any employee of the legislature or of a particular legislator under color of his or her capacity as such an employee is necessarily protected by the Speech or Debate Clause in the context of a grand jury proceeding. Nor are we suggesting that anything done by third parties only tangentially related to the functioning of the legislative process is similarly protected. The constitutional immunity may be invoked by an employee only when he or she is "acting in the sphere of legitimate legislative activity," *Tenney v. Brandhove, op. cit.*, on behalf of the legislature or legislator and at the latter's direction. This readily enforceable standard narrowly restricts the immunity afforded by the Constitution yet takes cognizance of the needs and realities of the contemporary legislative process. It protects those who act in effect, as an extension of the legislator but gives no

special status to those who, while legislative employees, act substantially upon their own.²⁵

The standard we propose with respect to third parties is likewise narrowly drawn. Only those persons "acting in the sphere of legitimate legislative activity," *Tenney v. Brandhove*, *op. cit.*, on behalf of a legislator and at his direction and whose form of assistance is indispensable to the performance of that legislative activity, are entitled to invoke the constitutional safeguard. Again, this insures the ability of the legislator to perform his legitimate legislative functions, yet excludes the substantial number of persons whose connection to constitutionally protected activity by legislators is remote or unnecessary.²⁶

²⁵ We note that Dr. Rodberg stated unequivocally in his affidavit that everything he has done as Senator Gravel's personal aide has been "done only after consultation with him and upon his express direction." See paragraph 7 of Rodberg affidavit.

²⁶ Thus a publisher acting on behalf of and at the direction of a Senator in the publication of material it is the legislator's constitutional right to publish and whose resources are required if a lengthy work is to be made generally available to the American public would be protected. A third party who, acting on his own initiative, transfers an unregistered firearm, *cf.* 26 U.S.C. §§5841-5872, to a Senator for the latter's use in considering gun control legislation would not be.

- D. The Speech or Debate Clause proscribes any investigation in a Grand Jury proceeding of the insertion of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds and the subsequent efforts by and on behalf of Senator Gravel to publish those Papers.**

We submit that application of the foregoing principles leads to the conclusion that the government is precluded from questioning any witness in any respect about the activities discussed *supra*. We have heretofore established that the insertion of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds and the subsequent efforts to publish generally the Papers placed in the record are "related to the due functioning of the legislative process." *United States v. Johnson, supra*. We have also seen that those who allegedly assisted Senator Gravel in the aforementioned efforts, particularly Dr. Rodberg, a member of the Senator's personal staff who worked only at the Senator's direction, are likewise protected by the Speech or Debate Clause. If we are correct in this regard, Senator Gravel, Dr. Rodberg and other persons who assisted Senator Gravel, would each be immune from criminal prosecution for any of their respective actions in this regard. But that is not the sole immunity that attaches: if the activities of these persons are within the ambit of the legislative privilege, not only is the government precluded from making them the subject of a criminal prosecution, it is precluded from making them the subject of a grand jury investigation. In short, they are not merely protected from prosecution, but are beyond the reach of the entire criminal process.

The Speech or Debate Clause applies to any and all actions of the executive branch (as well as those of the

judicial branch) which encroach upon the prerogatives of the legislature and which invade the independence of that deliberative body as a separate and co-equal branch of government. It is thus applicable to grand jury or other investigative proceedings initiated by the executive. The argument of the government made in both courts below (and rejected emphatically by both) that the constitutional provision does not apply unless and until an indictment is returned is entirely too narrow a view of the Clause paying scant attention to its First Amendment roots and finds no support in the decisions of this or any other court.

The fundamental interests underlying the Speech or Debate Clause and the First Amendment overlap in many respects. The Amendment is intended to protect full, robust debate upon issues of public importance. *New York Times v. Sullivan*, 376 U.S. 254, 269-271 (1964). The legislative privilege is designed to protect the vigorous and fearless debate of issues of public importance so necessary to those entrusted with the public responsibility for the legislative process. As James Wilson wrote:

"In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech."²⁷

This Court has recognized explicitly that freedom of debate in the broad sense, the right of the legislature to exercise the rights of expression and petition which are enshrined in the First Amendment, lie at the heart of the Speech or Debate Clause. *United States v. Johnson*, *supra* at 180-182.

²⁷ 1 The Works of James Wilson 421, *op. cit.*

Deterrence of a legislator's full exercise of these rights and responsibilities may be achieved by measures short of criminal prosecution. Uncontrolled interrogation of persons with respect to "legitimate legislative activity," *Tenney v. Brandhove*, *supra*, may well deter the exercise of legislative rights and responsibilities. As the Court of Appeals noted: "Intimidation of a legislator, harassment, embarrassment with the electorate, all . . . can flow from mere inquiry, [and therefore] the possibility of judicial inquiry could itself serve as an effective deterrent to speaking out against executive policy."²⁸

We emphasize the confluence of the First Amendment with the Speech or Debate Clause because it is this Court's First Amendment opinions which so decisively repudiate the position urged by the government. Numerous decisions have established beyond cavil that interrogation and investigation with respect to certain subjects may effectively deter the full exercise of First Amendment rights. This abridgement of constitutional protection occurs without regard to whether or not the investigation and interrogation can or do lead to criminal charges. See, e.g., *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *DeGregory v. Attorney General*, 383 U.S. 825 (1966); cf. *Caldwell v. United States*, 434 F.2d 1081 (9 Cir., 1970), cert. granted 402 U.S. 942 (1971). In the same way, the full exercise of legislative responsibilities can be abridged through investigation and interrogation.

Particularly is this true where the investigation occurs before a grand jury. It must be recognized that the

²⁸ Pet. for Writ of Certiorari in No. 71-1017, p. 6A.

grand jury is a formidable weapon of interrogation. No one other than the grand jurors, the stenographer and the government attorneys are present with a witness.²⁹ What occurs before the grand jury is generally kept secret.³⁰ Yet the power of government to interrogate witnesses and examine them on a subject is virtually uncontrolled. The legislator would have no control over this secret, unlimited interrogation and, not being present, could only speculate, with unease, about the questions propounded to witnesses. In *In re Oliver*, 333 U.S. 257, 273 (1948), the Court spoke of "this nation's historic distrust of secret proceedings." Remembering that "[o]ne must not expect uncommon courage even in legislators," *Tenney v. Brandhove*, 341 U.S. at 377, it can be seen that investigating constitutionally protected legislative activity under such conditions would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo*, 360 U.S. at 571. Executive examination of "legitimate legislative activity" in the grand jury is nothing less than executive surveillance and intimidation of the legislature. This is precisely the evil against which the Speech or Debate Clause was intended to guard.

The executive's contention here is without any decisional support. In the only previous case in which the question of governmental violation of the Speech or Debate Clause in the grand jury has arisen, *United States v. Johnson*, 419 F.2d 56, 58 (4 Cir., 1969), the Court observed that evidence adduced before a grand jury of a speech by a Congressman was "constitutionally imper-

²⁹ Rule 6(d) of the Federal Rules of Criminal Procedure.

³⁰ F.R. Crim. P. 6(e).

missible evidence." We have already noted the line of decisions in this Court holding that inquiry on a given subject matter in an investigatory setting may well violate analagous First Amendment freedoms.

Because all the activities in question are within "the sphere of legitimate legislative activity" and all the persons allegedly involved within the ambit of the constitutional provision, the entire matter is beyond the constitutional competence of the grand jury. Because none of the persons involved could be criminally prosecuted for the activities in question, and because the mere investigation itself necessarily inhibits vigorous legislative activity, the government simply may not inquire into the matter in the grand jury forum. And this conclusion holds without regard for whom the witness or witnesses might be whom the government wanted to question before the grand jury, even persons who did not participate in the activity and were not legislators or legislative aides of those who did: This Court has said that the Speech or Debate Clause "will be read broadly to effectuate its purposes." *United States v. Johnson*, *supra* at 180. In the context of this case, that means placing the entire subject of the insertion of the Pentagon Papers into the Subcommittee record and the publication of those Papers beyond the competence of the executive to inquire into in a grand jury proceeding. Such a result is mandated by the decisions of this Court and by the historical and contemporary function of the Clause to preserve a vigorous and independent legislature, particularly its right to expose shortcomings of the executive branch. This Court should not retreat from its steadfast protection of legislative liberty from encroachment, in whatever form or proceeding, by "an unfriendly executive," *United States v. Johnson*, *supra* at 179, "however powerful, to whom the exercise of that liberty may occasion offense." *Tenney v. Brandhove*, *supra* at 373 (quoting James Wilson).

E. Neither Senator Gravel nor Dr. Rodberg may be questioned about the source of the copy of the Pentagon Papers obtained by the Senator.

As the Court of Appeals noted, the question of whether Senator Gravel may be questioned regarding the source of his copy of the Pentagon Papers is to be distinguished from the question whether Senator Gravel or others may be subject to criminal prosecution in connection with his obtaining of that copy. We are here concerned only with the first, a matter that goes to the Senator's ability to protect his source.

Full and vigorous debate among members of Congress is to be assured, it is to be encouraged. If the Congress is to be a true "marketplace of ideas" each member must have the greatest possible information about matters of public concern. The history of United States decision-making with respect to Southeast Asia is a matter of the utmost importance. It bears directly on the current situation there and what American policy ought to be. The Papers, however, hold implications beyond the current American role in Southeast Asia. In recent years, there has been growing debate in the Congress, particularly in the Senate, that the fundamental system of checks and balances upon which our government rests threatens to become undone and that the executive branch has exceeded its authority in the area of foreign affairs. Indeed, legislation is presently under consideration which would limit the power of the President to conduct such wars as the one in Southeast Asia. The evidence in the Pentagon Papers of executive mismanagement of and deceit with respect to American policy since the close of World War II is of major importance to that ongoing discussion. No doubt there is considerable other material which is probative in that discussion as well.

Notwithstanding the importance of the Pentagon Papers and similar material to the full performance of the legislative function, allowing executive investigation in a grand jury proceeding as to who has provided Senator Gravel with the Papers will inevitably inhibit potential sources from providing similar information and discourage Congressmen from seeking it. Those who would provide such information if their identities and the attendant circumstances would be kept in confidence will no longer do so if they come to fear that that confidence cannot be kept. Such fear will be the result of acceptance of the government's position on this point. Similarly, Congressmen will be discouraged from even seeking out such sources of information if they know they cannot promise anonymity to them. We believe the conclusion of the Court of Appeals is unassailable:

"Effective debate presupposes access to facts... Since the scope of the privilege should be as broad as is necessary to achieve its purpose of assuring full and free debate, see *Stockdale v. Hansard*, 1839, 9 Ad. & E. 2, 150, 112 Eng. Rep. 1112, 1169, we include therein inquiries which would restrict acquisition of information. It seems manifest that allowing a grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them. Cf. *Caldwell v. United States*, 9 Cir., 1970, 434 F.2d 1081, cert. granted 402 U.S. 942."³¹

As a deterrent upon the vigorous debate envisioned by the Founding Fathers, any inquiry in a grand jury pro-

³¹ Pet. for Writ of Certiorari in No. 71-1017, p. 7A.

ceeding about the source of Senator Gravel's copy of the Pentagon Papers is proscribed by the Speech or Debate Clause.³²

Finally, we will not repeat the discussion as to why it is necessary to protect legislative aides acting on behalf of a Senator or Representative and at his express direction. For all the reasons discussed *supra* at pp. 23-33, since the Senator cannot be questioned about his source, Dr. Rodberg cannot be either.

³² By citing *Caldwell v. United States*, *supra*, the Court of Appeals intended to analogize the right of Senator Gravel to protect his source to the right of a newsman to protect his. We believe that analogy apt and would only point out that the constitutional protection is even greater here. While the First Amendment is not absolute and the newsman's source subject to disclosure upon a showing of compelling governmental need, no balancing of interests arises under the Speech or Debate Clause: the Senator need not disclose his source under any circumstances.

CONCLUSION

For the foregoing reasons, this Court should hold (1) that no witness before the grand jury may be questioned in any respect about the insertion of Senator Gravel's copy of the Pentagon Papers into the record of the Senate Subcommittee on Public Buildings and Grounds nor about the subsequent efforts to make that copy generally available to the American public, and (2) neither Senator Gravel nor Dr. Rodberg may be questioned in regard to the Senator's obtaining of that copy.

Respectfully submitted,

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Certificate of Service

This is to certify that three (3) copies of the foregoing brief were served upon Robert Reinstein, 1715 North Broad Street, Philadelphia, Pennsylvania 19122, counsel for Hon. Mike Gravel and upon Erwin Griswold, Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for the United States, by first class mail special delivery, postage prepaid, this 12th day of April 1972.

JAMES REIF

Supreme Court of the United States.

OCTOBER TERM, 1971.

Nos. 71-1017

71-1026

MIKE GRAVEL, UNITED STATES SENATOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

MIKE GRAVEL, UNITED STATES SENATOR,

Respondent.

ON WRITS OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF OF SENATOR MIKE GRAVEL.

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Supreme Court, U.S.
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REPLY BRIEF OF SENATOR MIKE GRAVEL.

PART I.

The Speech or Debate Clause Prohibits Grand Jury Investigation into the Legislative Acts of a Senator Through the Interrogation of Persons Who Assisted Him in the Performance of His Duties.

1. The Solicitor General has obfuscated a central issue before this Court by creating and then rebutting a non-existent claim. The Solicitor General characterizes this case as involving the question of whether the Speech or Debate Clause "extends" to protecting those who assist a senator from *accountability* for the commission of illegal acts. In fact, this matter is of absolutely no relevance to the narrow issue which is before this Court—namely, whether there is a *privilege against inquiry* under the Clause by the Executive and grand jury into a senator's privileged acts. Throughout these proceedings, Senator Gravel has never ventured a view with respect to whether or not any party with whom he dealt is "bathed" with any kind of immunity from prosecution or accountability.¹ Even assuming, *arguendo*, that an aide or printer may be held accountable for violating a criminal or civil act, see *Powell v. McCormack*, 395 U.S. 486 (1969), and *Kilbourn v. Thompson*, 103 U.S. 168 (1880), it certainly does not follow that testimony may be procured in violation of the Senator's own privilege. *United States v. Johnson*, 383 U.S. 169 (1966); *Ex parte Wason*, L.R. 4 Q.B. 573 (1868); *Rex v. Rule*, 2 K.B. 372 (1937). In this respect, the Clause operates precisely as do other testimonial privileges familiar to the courts, such as the attorney-client privilege and the priest-penitent privilege.² And the Executive has heretofore stressed the

¹ Consolidated brief of Senator Gravel, at 92-93.

² Presumably, for example, the Justice Department could obtain an indictment against Beacon Press officials without resort to questioning parties about the Senator's protected activities, since

distinction it now blurs; although assistants to the President are clearly accountable for illegal acts, the President has invoked his privilege to prevent them from testifying before congressional committees. (See Brief of Senator Gravel at 110-112.)

2. The Solicitor General argues strenuously that the privilege belongs only to senators and representatives (Brief, at 13-17, 31-38). We agree. But this begs the issue of whether the Senator's own privilege is violated when his protected activities are inquired into through an Executive and grand jury interrogation of persons who assisted him. No one would argue that the attorney-client privilege, which belongs exclusively to the client and exists for his benefit alone, could be defeated by questioning the attorney. As the Senate cogently stated in its brief *amicus curiae* (at 5);

"For if the activities are protected as [the Solicitor General] assumes, they should be beyond inquiry."

3. The Solicitor General, while asserting the absence of historical evidence to cast light on the meaning of the Speech or Debate Clause, reasons by purported analogy from the historical development of the freedom from arrest clause (Brief, at 17-22). Apart from the fact that the two clauses appear in the same section of the Constitution,

Beacon's publication of the Subcommittee record is a matter of public record, replete with public announcements and the readily obtainable physical document itself in four volumes. In prosecuting such an indictment, the Justice Department would, of course, be limited in its introduction of evidence by the guidelines set forth in *United States v. Johnson, supra*, and this Court, if faced with the question, might decide that, as in England (see Parliamentary Papers Act, 3 & 4 Vict., c. 9, and *Wason v. Walter*, L.R. 4 Q.B. 73 (1868)), printers of such papers are immune from criminal and civil liability. But as we have said, these difficult issues are not present in the case at bar.

they have no relation to each other. These two privileges are historically distinct. The sole purpose of the privilege from arrest was to protect members from the molestations of civil arrests emanating from suits lodged in inferior tribunals and never had any applicability to criminal proceedings. See generally, T. P. Taswell-Langmead, *English Constitutional History*, 340-348 (4th edition, 1890). The freedom of speech privilege, on the other hand, was specifically designed to preclude harassment and intimidation by the Executive. *Id.*, at 336, 340. Further, there was never any justification, in light of the limited purpose for the privilege from arrest, to "extend" the privilege to aides in order to vindicate that purpose; and this unwarranted extension was reversed by Parliament itself prior to our Revolution. See generally, C. F. Wittke, *The History of English Parliamentary Privilege*, 39-42 (1921). The abuses and checkered history of the privilege from arrest were well understood by the Framers, who severely limited its scope. *Williamson v. United States*, 207 U.S. 425 (1908). See *Long v. Ansell*, 293 U.S. 76 (1934). There is no evidence of similar abuses by the exercise of the free speech privilege, and the Framers viewed it as an essential bedrock of separation of powers. *United States v. Johnson*, 383 U.S. 169, 178 (1966). That aides can be arrested for robbing a bank or not paying alimony simply has no bearing upon whether they may be interrogated about how and why a senator decided to speak or vote as he did.

4. In a related manner, the Solicitor General argues that the "linguistic precision" of the Clause reveals that only senators and representatives may not be questioned before the grand jury. He reaches this result by contrasting the wording of the Clause with the subject matter wording of its predecessors in the English Bill of Rights, the Articles of Confederation and the state constitutions.

As we pointed out in our brief (at 92-93, n. 123), the Committee on Detail wrote the Clause in subject matter terms, and the present language was changed by the Committee on Style without any indication that it intended this difference to be substantive. If indeed the change were substantive; one would have expected, first, that it would have been made other than by the Committee on Style, and that the change would have provoked at least some debate. Not only was there no debate in the Convention, but an exhaustive review of the ratification debates has failed to uncover even a single comment that the Speech or Debate Clause might have a different meaning from that of its predecessors. See, e.g., II *Eliot's Debates* 52-54 (1788) (Massachusetts); II *id.*, at 325, 329 (New York); II *id.*, at 550 (Maryland); III *id.*, at 73 (North Carolina); III *id.*, at 368-375 (Virginia).³ And this Court has twice affirmed that the Clause is substantially the same as that in the English Bill of Rights. *Powell v. McCormack*, *supra*, at 502, n. 20; *United States v. Johnson*, *supra*, at 177-178.

5. In an apparent attempt to reconcile with the case at bar inconsistent positions taken by the Justice Department in prior and pending cases, see, e.g., *Doe v. McMillan*, 442 F. 2d 879 (D.C. Cir. 1971); *Barr v. Matteo*, 360 U.S. 564 (1959); *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the Solicitor General proposes that those who assisted a Senator should be absolutely immune from civil tort suits, but should be freely inquirable by the Executive and the grand jury about the Senator's privileged acts (Brief, at 24-31, 37-38). The Solicitor General apparently realizes that public policy mandates a court-made rule to protect the operation of the legislative process from unrestrained

³ In the above debates, the Speech or Debate Clause received only cursory mention and was approved without dissent. In each of the other state debates, there is no recorded mention of the Clause.

questioning of aides in civil suits, but he refuses to recognize the much stronger, fundamental public policy which led the Framers to protect that process from unrestrained inquiry by co-ordinate but separate branches of government. As this Court said in *United States v. Johnson, supra*, at 181:

"[T]he privilege was not born primarily to avoid private suits . . . but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary."

Thus, the yardstick for measuring the scope of the legislative privilege in this case is not, as suggested by the Solicitor General, to be borrowed from civil suits such as *Dombrowski v. Eastland, supra*, and *Powell v. McCormack, supra*, which speak of protecting the legislator from pocket-book loss and distraction. Rather, this Court must look to the historical purposes articulated in *United States v. Johnson, supra*, which speaks of preserving separation of powers and of preventing executive intimidation and harassment and hostile judicial action.

In this respect, it is of dispositive weight to note that the United States Senate, in its brief *amicus curiae*, acknowledges the *limited* application of the Clause in civil suits brought to protect individual constitutional rights, but the Senate strongly asserts the *absolute* applicability of the Clause in separation of powers cases to prevent the grand jury from being turned into an executive instrument of harassment and intimidation. (See Senate's Brief, at 9, 12-13.) As both the Senate and Senator Gravel recognize, the basic flaw in the Solicitor General's argument is that it turns the Speech or Debate Clause on its head. It would be a supreme irony for this privilege, which was designed to protect against executive intimidation and was placed

in a Constitution which obliges the courts to protect individual rights, to be construed so that the courts deny relief for the violation of secured rights but lend their assistance to the Executive in breaching the wall of separation of powers.

6. The Solicitor General asserts, without any citation of authority, that legislative assistants are not subject to the disciplinary powers of the Senate (Brief, at 9, 34). Even if supportable, the relevance of this assertion is at best dubious, inasmuch as the case at bar does not involve the accountability of such assistants. But, in fact, this assertion is not supportable; for the Senate possesses and has exercised the power to punish wayward aides and assistants of the Senate and of individual members. For example, the Senate tried and expelled its own Sergeant-at-Arms for publishing a libellous article. Senate Journal, January 10, 1933, 159-160, 172-173. Moreover, this Court has recognized that the enumerated powers of each House to make rules for its proceedings (Art. I, sec. 5) necessarily implies the power to punish anyone—member, aide, or complete outsider—who violates those rules. *Anderson v. Dunn*, 6 Wheat. 204 (1821); *Journey v. MacCracken*, 294 U.S. 125 (1935). See *Groppi v. Leslie*, U.S. , 92 S.Ct. 582 (1972). In fact, in the exercise of that power, the Senate has adopted Rule 36, which specifically provides for the punishment of members and assistants who “disclose the secret or confidential business or proceedings of the Senate.” *Senate Manual*, sec. 36 (1967 ed.).⁴ Under this same rule, the

⁴ The adoption of this standing rule resulted from the censure of Senator Benjamin Tappan of Ohio in 1844 for causing to be published in *The New York Evening Post*, a secret message from President Tyler to the Senate concerning the annexation of Texas. Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, *Senate Election, Expulsion, and Censure Cases* (Doc. No. 71, 1962), 11-13. In at least two other

Senate has established a procedure to waive the testimonial privilege to prevent a miscarriage of justice. Thus, Rule 36 has uniformly been read to permit a Senate aide to testify in any judicial proceeding after being authorized to do so by Senate resolution. See also 2 U.S.C. § 130b (g); *United States Servicemen's Fund v. Eastland*, Civil No. 1474-70 (D. D.C., decided October 21, 1971, and discussed in the Solicitor General's brief at 27, n. 15).

In addition, the conduct of a person who assists a senator in the performance of his duties is subject to the restraints of the legislative process because the senator himself is responsible to the electorate and to his House for the conduct of such persons. Directly on point is the 1928 censure of Senator Jonathan Bingham of Connecticut who was punished by the Senate because *his aide* violated the standing rules of the Senate by being present during closed executive committee sessions and leaking confidential information to corporate officials. Subcommittee on privileges and Elections of the Senate Committee on Rules and Administration, *Senate Election, Expulsion, and Censure Cases* (Doc. No. 71, 1962, at 125-127).

In any event, we reiterate that the case at bar does not turn on or involve issues of accountability.

memorable cases, the Senate has sat as a judicial body to determine whether members had abused the exercise of their informing function. In the case of Senator Robert M. LaFollette, the Senate dismissed a censure resolution charging disloyalty and sedition based upon a speech given before a political convention, during the First World War, because "the speech did not justify any action by the Senate." *Id.*, at 110.

In the most recent case, arising in 1954, Senator Joseph R. McCarthy of Wisconsin was charged with the "receipt or use of confidential or classified documents or other confidential information from Executive files." *Id.*, at 153.

Although Senator McCarthy was censured for other reasons, the Committee did not recommend censure on these charges because it found "mitigating circumstances." *Ibid.*

7. The Solicitor General suggests that there would be staggering consequences to law enforcement if the Executive and grand jury cannot investigate into the privileged legislative activities of congressmen. First of all, in the past 195 years of the Republic's history, there have been only a handful of cases in which the Executive and grand jury have seen fit to so much as attempt to delve into legislative activity for any purpose. The case most directly on point, the 1797 grand jury investigation of Congressman Cabell for issuing newsletters critical of the Administration's policy toward France, was condemned as a blatant violation of the Constitution. (See our brief at 53-58.)⁵

The Solicitor General's ultimate hypothetical of possible abuse is a conspiracy between a senator and others to deceive the Senate in a speech which he knows to contain false information (Brief, at 34-36). In 1868 this precise situation occurred in England and was the subject of the celebrated decision of *Ex parte Wason*, L.R. 4 Q.B. 573, where the Queen's Bench held that no criminal proceeding, including the mere filing of an information, could be instituted against a member or outsider for such a conspiracy, for to do so would be to impugn the free speech privilege. It is now 104 years later, and England seems to have survived.⁶

⁵ See also *Lyon's Case*, Case No. 6646, 15 Fed. Cas. 1183 (C.C.D. Vt. 1798) (our brief at 64-67); *United States v. Johnson*, 419 F. 2d 56 (4th Cir. 1969), where the Court of Appeals stated that testimony about Johnson's speech before the grand jury had been "constitutionally impermissible"; *United States v. Brewster*, No. 1025, Jurisdiction Postponed, 401 U.S. 935, No. 70-45 (restored to the calendar for reargument) 40 U.S.L.W. 3351.

⁶ And, if we may be permitted to observe, the decline of the Empire has never been traced to the decision in *Ex Parte Wason*.

PART II.

The Publication by a Senator of an Official Public Record of a Subcommittee, of Which He is Chairman, Critical of Executive Conduct in Foreign Relations, is Privileged From Judicial Inquiry by the Speech or Debate Clause.

8. To support his position that the publication of committee reports is not encompassed by the free speech privilege, the Solicitor General places principal historical reliance upon the 1688 case of *Rex v. Williams*, 13 How. St. Tr. 1370, 2 Show. K.B. 372, Com. 18, 89 Eng. Rep. 1048 (Brief, at 46-47). However, as we discussed in detail in our brief (at 67-75), that prosecution was a classic example of intimidation of a critical legislator by the Crown and of accountability before a hostile judiciary. This case was deemed so violent a breach of the free speech privilege that it was the principal cause of the exile of James II and of the codification of the free speech privilege in the English Bill of Rights. The decision was later condemned as a disgrace to the country and as "decided in the worst of times." *Rex v. Wright*, 8 Tr. 293, 101 Eng. Rep. 1396 (1799).

Certainly, no one would suggest that the notorious prosecution of Sir John Eliot in 1629, which led to the first comprehensive declaration of the privilege, can be resurrected as a precedent to narrow the scope of the free speech privilege. The real importance of the *Williams* case lies in the fact that it was "one of the immediate causes of the Revolution . . . [and] the occasion of one of the most important clauses in the Bill of Rights, and probably therefore of the like provision in the Constitution of the United States." C. H. McIlwain, *The High Court of Parliament and Its Supremacy*, 242 (1910). The *Williams* case, therefore, affords significant support to the position that publication of committee records is protected by the privilege.

9. The Solicitor General concedes that certain forms of publication are protected from judicial inquiry by the Speech or Debate Clause. He includes therein, to the exclusion of all other forms of publication, committee reports delivered to Members only, and the Congressional Record (Brief, at 40), because "they are the means Congress has selected for informing its membership about its business." Directly contrary to this assertion is the position of the United States Senate, which is more qualified to determine what methods of publication are necessary for its own processes:

"One of these duties, important as any other, is the duty of informing other Members, constituents and the general public, on the issues of the day. This is done in many ways, most of which were not technically possible in 1789. Floor debate and belated newspapers reports were practically the only means available at the time of the founding. Now, there are many means of disseminating information: wire services, radio and television, telephone and telegraph, as well as floor debate, newspapers, books, magazines, newsletters, press releases, committee reports, the *Congressional Record*, and legislative services. In today's hectic and complicated world, the various methods of informing vary in effectiveness. Each Member must decide for himself from time to time which issues require ventilation and what methods to use. It is not for the Executive to challenge nor for the Judiciary to judge a Member's choice of issues to publicize or methods of publication regardless of whether they may be considered ill-advised." (Brief of Senate as *Amicus Curiae*, at 6.)

The doctrine of separation of powers and the principles of comity require that this determination by the Senate be

adopted by the courts. Otherwise, the courts will adopt for themselves the role of final arbiter of "the means Congress has selected" to inform itself and the electorate (Solicitor General's Brief, at 40).

10. The Solicitor General raises a red herring when he suggests the publication involved herein is somehow different for purposes of the privilege from publication done with official approval of the House (Brief, at 11). This suggestion should be dismissed for four reasons:

(a) At least since *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), it has been settled that the privilege is personal to the legislator himself and does not depend on "whether the exercise was regular according to the rules of the house, or irregular and against their rules."

(b) The logic of the Solicitor General's argument is that the privilege would protect only Congressmen who are in accord with the majority's sentiment. In terms of importance to democracy, it may well be more important to protect a dissenter.

(c) If an act of a congressman is *ab initio* unrelated to the legislative process, a simple approval of the House cannot magically transmute a nonlegislative into a legislative act.

(d) In any event, even if the approval of the Senate is relevant in this case, the Senate has joined Senator Gravel in the assertion of the privilege in this instance of publication (Brief of Senate, at 6).

11. In his argument concerning the alleged lack of relationship of the publication of the Subcommittee record to the legislative process, the Solicitor General sets forth two "facts" which are unsupported in the record and which simply are not true.

(a) The Solicitor General asserts that the chairman of the parent committee "apparently recognized that the re-

publication was not necessary or appropriate to the proper performance of any legislative function, since he refused to authorize it" (Brief, at 42). When this assertion was made by counsel for the Internal Security Division in the District Court before the finder of fact, on the sole basis of an unsubstantiated and hearsay statement in a newspaper article, Judge Garrity refused to so find (App. 88-89). This "fact," even if true, would be irrelevant; but it just so happens, as Senator Dole stated on the floor of the Senate, that it is false. Cong. Rec. S. 4620 (daily ed., March 22, 1972).

(b) The Solicitor General also proffers the following "facts": "[The publication of the Subcommittee record] involved no supplying to the members of Congress of information that they needed in performing their legislative duties. The contents did not relate to any pending Congressional business. The material was neither the product of a Congressional hearing, nor something supplied to Congress to be considered in connection with pending legislative business" (Brief, at 41). There is not even a scintilla of support for these naked assertions in either the record of this case or in the opinions of the courts below. Were judicial notice to be taken about "Congressional business," it would be observed that, at the time of the Subcommittee hearing and of the publication of the record, the Senate was debating the Mansfield Amendment and other pending and potential legislation (*e.g.*, the draft and military appropriations bills) which relate directly to the contents of the Subcommittee record. Surely, the Solicitor General is not suggesting that the war in Vietnam is not the business of Congress.⁷

⁷ The mere fact that the President saw fit to send the "Pentagon Papers" to Congress rebuts the very assertion of the Solicitor General that the contents of the Subcommittee record do not relate to pending Congressional business.

12. The Solicitor General has taken great liberties in his discussion of prior English and American precedents.

(a) While conceding that "certain republications of Parliamentary debate are now privileged" in England (Brief, at 47), the Solicitor General denies that earlier decisions holding to the contrary were repudiated. In this connection he cites language from *Wason v. Walter*, L.R. 4 Q.B. 73 (1868), which treats with approval part of the decision in *Stockdale v. Hansard*, 9 Ad. & E. 1, 112 Eng. Rep. 1112 (1839). But that part of *Stockdale* did not deal with whether the privilege encompassed publication; it dealt instead with the ruling that a resolution of one House is not binding on the courts. The court in *Wason* agreed with this ruling, but stated that it had "no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House, or protected by the assertion of its privilege, but whether it is, independently of such order or assertion of privilege, in itself privileged and lawful." *Wason*, *supra*, at 87, quoted in Solicitor General's brief, at 49. And the court had no trouble in concluding, on the basis of the informing function, that publication of legislative proceedings is "in itself privileged and lawful" because "it is essential to the workings of our parliamentary system, and to the welfare of the nation." *Id.*, at 95. (See Brief of Senator Gravel at 79-80.)

A third misstatement of fact by the Solicitor General, although of lesser importance, should be brought to the attention of the Court. The Solicitor General states that all 47 volumes of the Pentagon Papers were entered by Senator Gravel into the Subcommittee record and then published by Beacon Press (Brief, p. 3). In fact, however, Senator Gravel did not enter certain documents, including four volumes on negotiations, into the record; and, accordingly, they were not published. This same material also was not published in the Department of Defense's edition of the Papers, which was printed by the Government Printing Office.

The Solicitor General also appears to take some solace from the fact that *Stockdale* had been overruled by a statute, the Parliamentary Papers Act, 3 & 4 Vict., c. 9 (1840). Yet this act was passed by both the Commons and the Lords, the latter being the High Court of England, and the act declares that the *Stockdale* court misapprehended existing law, including, e.g., *Rex v. Wright*, 8 T.R. 293, 101 Eng. Rep. 1396 (1799). The statute's effect is the same as if the House of Lords had reversed the King's Bench on a writ of error. (See Brief of Senator Gravel at 116-121.)

(b) The prior American cases cited by the Solicitor General do not hold "that the legislative privilege for speech or debate does not extend to republication" (Solicitor General's Brief at 49). The comments about "republication" in *McGovern v. Martz*, 182 F. Supp. 343 (D. D.C. 1960) were clearly *dicta* since there was no publication except in the Congressional Record; and even in *dicta*, the court suggested that a privilege, albeit qualified by a malice requirement, would apply to other publications. *Id.*, at 347. *Long v. Ansell*, 69 F. 2d 386 (D.C. Cir.) aff'd 293 U.S. 76 (1934) was not even a Speech or Debate Clause case; it involved a claim of a Senator that he was immune from service of process because of the privilege from arrest. The only reference to the free speech privilege is in *dictum* in a final, brief paragraph. *Id.*, at 389. On review, this Court did not even refer to the Speech or Debate Clause. 293 U.S. 76 (1934).

In *Hentoff v. Ichord*, 318 F. Supp. 1175, 1179 (D. D.C. 1970), the Court held that the Speech or Debate Clause deprived it of jurisdiction to entertain a complaint against congressmen "seeking any remedy" for the publication of a committee record. The Public Printer was enjoined under the doctrine of *Powell v. McCormack*, *supra*, because it was assisting in an action which threatened to violate individual constitutional rights. *Id.*, at 1180. See also

Hearst v. Black, 87 F. 2d 68 (D.C. Cir. 1936), and *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729, 731 (D. D.C. 1956) (3-judge court), which dismissed, on principles of separation of powers, actions which sought to enjoin congressmen from publishing information in their possession.

13. We did not in our brief treat the Solicitor General's certified question as to whether congressional aides have a common law privilege to refuse to testify before a grand jury about publication of material introduced by their employers into an official subcommittee record, because we had difficulty understanding the precise thrust of the question and therefore preferred to see the Solicitor General's contention in his brief and deal with it in our reply brief.

However, the Solicitor General appears to deal with the question in three pages (at 52-54), without citation of any relevant authority. In particular, the Solicitor General has not explained how it is that those who assist the President have a privilege, apparently derived from the common law, to refuse to testify before congressional committees about the President's privileged conduct, but that those who assist a congressman do not have the same privilege to be free from interrogation by co-ordinate branches about the congressman's privileged conduct. We therefore feel that *certiorari* with respect to this issue should be dismissed as improvidently granted.

Should the Court nevertheless reach the merits of this question, Senator Gravel feels that there is nothing that he can profitably add to the arguments set forth by the Unitarian Universalist Association in its brief *amicus curiae* in this case (at 30-33), and Senator Gravel thus adopts those arguments. Senator Gravel does, however, re-emphasize his position that no common law privilege is here needed, where the privilege is explicitly set forth

in the Constitution, and this Court neither has to resort to implications nor has to fashion judicial substantive law.

Conclusion.

In conclusion, we join the United States Senate in urging this Court to hold that "[n]either Senator Gravel nor his aide should be required to testify before the Grand Jury, and no other witness should be permitted to testify as to the activities of the Senator or his aide." (Brief of Senate, at 21.)

Respectfully submitted,

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Nos. 71-1017 and 71-1026

APR 14 1971

MICHAEL ROSEN, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1971

MIKE GRAVEL, UNITED STATES SENATOR, PETITIONER

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

MIKE GRAVEL, UNITED STATES SENATOR

**ON WRITS OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

REPLY BRIEF FOR THE UNITED STATES

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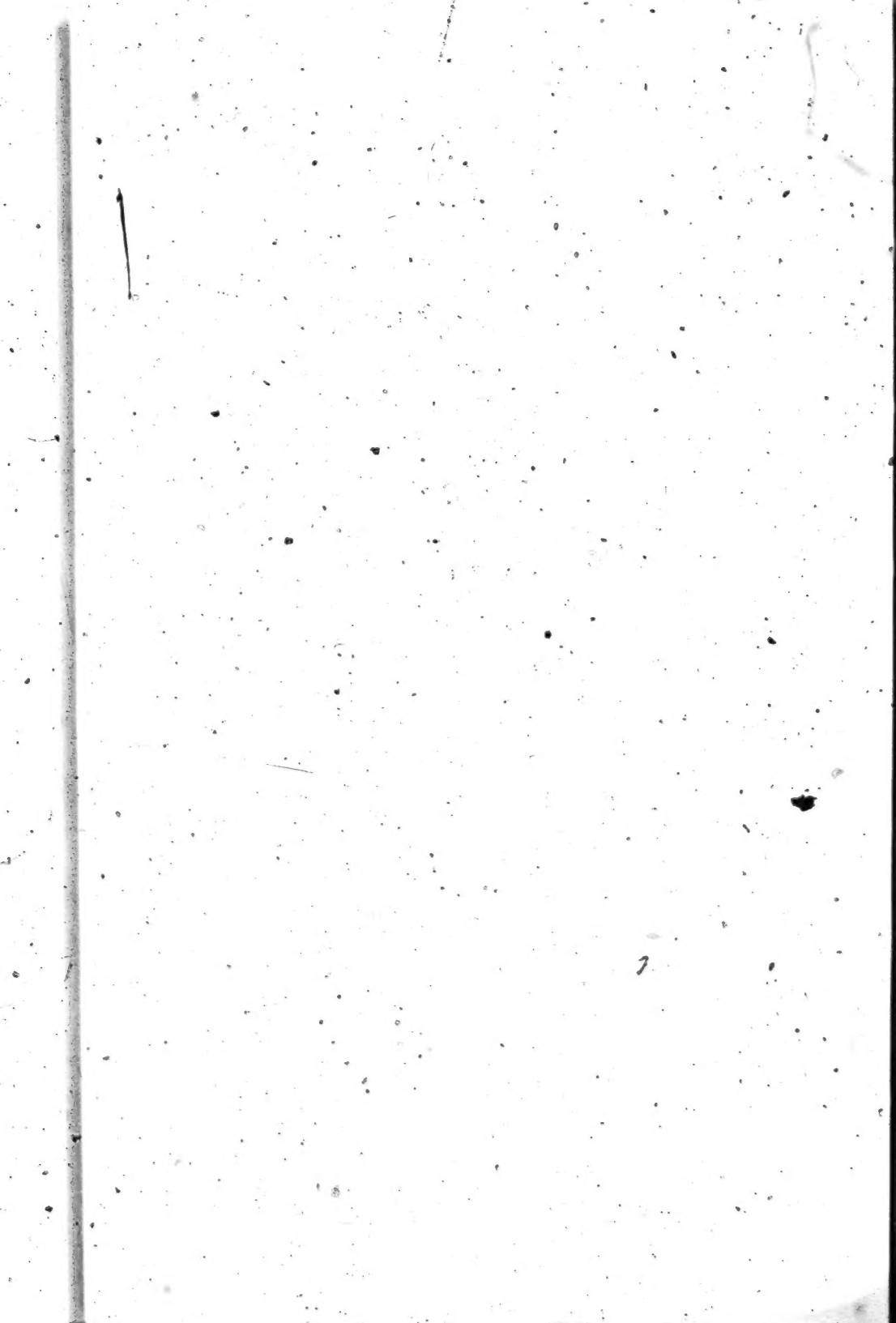
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In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1017 and 71-1026

MIKE GRAVEL, UNITED STATES SENATOR, PETITIONER

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, PETITIONER

v.

MIKE GRAVEL, UNITED STATES SENATOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Most of the material in Senator Gravel's brief and the *amicus curiae* brief for the Senate relates either to the claim that private republication is protected "Speech or Debate" or to the claim that Senators may immunize aides and private third persons under their "Speech or Debate" privilege; however, two arguments, one made in each brief, cut across these discrete issues. Senator Gravel suggests that the record indicates that the purpose of the grand jury investiga-

tion is to attack him; the Senate urges that Congress can define the bounds of its own privilege.

1. Senator Gravel argues (Gravel Br. 17, 19-20, 94-95) ¹ that the Department of Justice intends, by questioning Dr. Leonard Rodberg and third parties, indirectly to conduct an investigation into his legislative acts, which could not be accomplished by subpoena of the Senator himself. Although this contention may be of only peripheral relevance to the broad legal issues presented by this case, we think it is important to point out that the record does not support the Senator's claim. The grand jury investigation into possible violation of federal criminal statutes (Gov't Br. 4 n. 2a) related to public disclosure of the "Pentagon Papers," and has not been directed to Senator Gravel individually, or as a United States Senator. Nor has it sought to affect the transaction of any business before Congress.

In the course of the investigation, subpoenas were served upon a large number of individuals,² but none

¹ "Gravel Br." refers to the consolidated brief for Senator Mike Gravel; "S. Br." refers to the Brief for the United States Senate, *Amicus Curiae*.

² The number and identity of those witnesses so far subpoenaed remains confidential with the grand jury except for those few who have contested their summons, e.g., *United States v. Doe (In the Matter of Idella Marx)*, 451 F.2d 466 (C.A. 1); *In the Matter of Ralph Starins*, EBD No. 71-201 (D. Mass. Jan. 20, 1972); *In the Matter of Noam Chomsky*, EBD No. 71-202 (D. Mass. Jan. 20, 1972); *In the Matter of Richard Falk*, EBD No. 71-165 (D. Mass. Jan. 20, 1972); *In the Matter of Samuel L. Popkin*, EBD Nos. 71-164 (D. Mass. August 19, 1971), 71-196 (October 8, 1971), and 71-210 (October 29, 1971); *In the Matter of David Halberstam*, EBD No. 71-211 (D. Mass. pending).

except Dr. Rodberg was a member of any Congressional committee or legislator's staff. Moreover, most of these persons have had no known contact with Senator Gravel, and no known contact with the papers after they came into his possession.³ On June 29, 1971, Dr. Rodberg was hired on the personal staff of Senator Gravel. On that date the Senator conducted a public subcommittee hearing to disclose the contents of the classified "Pentagon Papers" which he had obtained "unauthorizedly" (Gov't Pet. App. A, p. 18). Although the government has contended at points in this litigation that there would be no constitutional impediment to calling Senator Gravel as a witness and that, consistent with the Constitution, he could be indicted if he engaged in certain unlawful activities, it has disavowed any intention of calling him at all, and has never done so.⁴

³ We assume that Senator Gravel obtained the papers on or about June 29, 1971, the date on which he held the subcommittee hearing.

⁴ Every reference to the record cited in support of this contention that the government intended to call the Senator (App. 81, 82, 84; Gravel Br. 19-20; 91-92) relates to legal argument by the investigating attorney, Mr. Vincent, that Dr. Rodberg as an aide could claim no greater privilege by derivation (App. p. 81) than Senator Gravel could claim for himself. For example, in concluding, Mr. Vincent said: "Now if [the privilege] cannot apply to criminal proceedings of a congressman, as I say, a fortiori, it cannot apply to criminal proceedings involving members of the staff" (App. p. 84). The rest of the record is equally devoid of support for the Senator's assertion that the government intended or stated that it intended to call him.

Senator Gravel's involvement in this case stems from his motion to intervene and to quash the Rodberg and Webber subpoenas. Thus, rather than presenting a case of the executive attempting to conduct an inquisition concerning a Senator, the record reflects an interposition of alleged legislative privilege to bar important aspects of a grand jury investigation of possible criminal activity by persons who are not members of Congress.

2. The Senate apparently claims the absolute right to determine the scope of its own privilege: "Neither the Executive nor the Judiciary can determine the extent of Congressional privilege if 'separation of powers' is to retain its function" (S. Br. 6). This is puzzling language, and it flies in the face of an important aspect of the general constitutional theory of our government, namely, that in cases otherwise properly before the federal courts, those courts have the duty to determine the conformity of the actions of the legislative and executive branches, as well as those of the judicial branch, with the Constitution. See *Marbury v. Madison*, 1 Cranch 137. Here a grand jury has asserted the power to question certain witnesses about certain matters, and Senator Gravel has challenged that proposed action as unconstitutional; that is the kind of conflict this Court has historically resolved. That the scope of the Speech or Debate Clause is not a problem outside the sphere of judicial power and competence is clearly established by *Kilbourn v. Thompson*, 103 U.S. 168; *United States v. Johnson*, 383 U.S. 169; and *Powell v. McCormack*, 395

U.S. 486.⁵ In short, this is a case calling for judicial interpretation of the Speech or Debate Clause, not for judicial "comity" (S. Br. at 3) to be extended to either the legislative or executive branch.

3. Advancing a "functional approach" to the Speech or Debate Clause (Gravel Br. 21-24) and stressing the "informing function" of Congress (Gravel Br. 37-48), Senator Gravel urges that his private republication of the Pentagon Papers through the Beacon Press, in Boston, is "Speech or Debate in either House".

We do not doubt—and, indeed we urge—that the Clause should be construed in the light of its intended function; but we do not believe its function has so changed since 1787 as to require that it be given a meaning today which it clearly did not have when written and adopted. We do not minimize the importance of a Congressman's responsibility to educate and inform the public (see *McGovern v. Marts*, 182 F. Supp. 343, 348 (D. D.C.)), but, as Senator Gravel's brief itself shows, the interest and propriety of a member of Congress communicating with and informing his constituents is not a new role forced on legislators by changing times (Gravel Br. 53-67). In 1787, legislators wrote and spoke to their constituents and sought their

⁵ A claim similar to that in the Senate's brief was asserted by Commons and decisively rejected in *Stockdale v. Hansard*, 9 Ad. & E. 1, 147-148, 112 Eng. Rep. 1112, 1168 (K.B.), where Lord Denman concluded: "Where the subject matter [of a claimed privilege] falls within their jurisdiction, no doubt we cannot question their judgment; but we are now enquiring whether the subject matter does fall within the jurisdiction of the House of Commons."

advice. If the framers believed that Congress could function effectively without private republication being privileged, a claim of changed conditions is not sufficient to alter the effect of that judgment.

As our original brief demonstrates in more detail, private republication was not thought by the framers to be privileged speech or debate. English law at the time of the adoption of our Constitution did not consider such republication privileged. However unpopular *Rex v. Williams*, 2 Show. K. B. 471, 89 Eng. Rep. 1048, may have been, and however closely it led to the subsequent enactment of the English Bill of Rights, the English decisions closest in time to the adoption of the American Constitution held private republication not to be privileged. *Rex v. Abingdon*, 1 Esp. 226 (1794), 170 Eng. Rep. 337; *Rex v. Creevey*, 1 M. & S. 272, 105 Eng. Rep. 102; cf. *Rex v. Wright*, 8 T. R. 293, 101 Eng. Rep. 1396 (House Report). See also, *Rex v. Salisbury*, 1 Ld. Raym. 341 (K.B. 1699) which is considered to have settled that “* * * there was no privilege for those who published documents connected with [Parliamentary] proceedings to the world at large.” 8 Holdsworth, *History of English Law* 376. Justice Story reflects this understanding, as does the language of the Speech or Debate Clause itself, in concluding that the Clause would not immunize a member for private republication of a speech. Story, 1 *Commentaries on the Constitution* (5th ed. Bigelow 1891) 630-631. See also 1 Kent, *Commentaries on American Law* (7th ed. 1851), 249 note c.

Senator Gravel relies extensively on Jefferson's protest over the grand jury investigation of Congressman

Cabell and Congress' repayment in 1840 of Congressman Matthew Lyon's fine (Gravel Br. 53-58; 64-67). But these were not expressions of views of the framers or Congress on the Speech or Debate Clause. Both Cabell and Lyon were asserted to be guilty of seditious libel, and the actions against them were challenged as infringements of freedom of the press and speech of citizens generally. Senator Gravel's extensive quotation from the protest of Jefferson omits his characterization of precisely what right of Congressman Cabell he believed to be offended. Jefferson argued that for the judiciary, to interpose itself between the Congressman and his constituents:

is to leave us, indeed, the shadow, but to take away the substance of representation, *which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business.* [Italicized language omitted in Gravel Br. 57; XVII The Writings of Thomas Jefferson (Memorial ed. 1904) 359.]⁶

Matthew Lyon was—as he had predicted—the first defendant prosecuted under the Sedition Act of 1798, 1 Stat. 596. As this Court has observed it was the “great controversy” over this Act “which first crystallized a national awareness of the central meaning of

⁶The Virginia House of Delegates condemned the Cabell presentment as a “violation of fundamental principles of representation * * * an usurpation of power * * * and a subjection of a natural right of speaking and writing freely.” Smith, *Freedom's Fetters* 95.

the First Amendment" *New York Times Co. v. Sullivan*, 376 U.S. 254, 273. Contemporaneously the Sedition Act was condemned by the Virginia Resolution of 1798 as an assertion of federal power—

expressly and positively forbidden by one of the amendments thereto,—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right. [4 Debates on the Federal Constitution (Elliott ed. 1845) 528-529]

And, on July 4, 1840, when Lyon's fine was remitted (6 Stat. 802), Congress had before it the House Judiciary Committee report expressly basing its recommendations on First Amendment grounds (8 Cong. Globe, 26th Cong., 1st Sess., 411).

The investigation of Cabell and prosecution of Lyon were not attacked because they represented breaches of a unique Congressional privilege; on the contrary, they were attacked because the Congressmen were the victims of a breach of a right common to all citizens. And this First Amendment attack on the Sedition Act "[a]lthough * * * never tested in this Court, * * * has carried the day in the court of history." *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 276. Neither case can be viewed as a contemporaneous expression of a belief that a Congressman's unique privilege with respect to Speech or Debate covered his private republication of protected speech.

Insofar as Senator Gravel's claim that private republication is an activity immune from grand jury inquiry rests on the argument that educating and informing the public is one of the things "generally done" by Congressmen in the discharge of their duties, his claim fails because not all things "generally done" by Congressmen are Speech or Debate. The framers clearly did not draft language to reach all activities of legislators and, as we noted in our main brief, this Court's decision in *United States v. Johnson*, 383 U.S. 169, 172, rejects such a position. It is part of a legislator's contemporary role to intercede with executive agencies on behalf of constituents,¹ but such conduct was held not to be Speech or Debate.

That private republication and communications are not Speech or Debate "does not exclude consideration of other protection" (Gov't. Pet. App. A, p. 28).

¹The authorities relied on by Senator Gravel (Gravel Br. 41, n. 41)—among others—support the view that personal intercessions with executive agencies, quite as much as public education, are a part of a contemporary Congressman's role.

Bibby and Davidson, in *On Capitol Hill* (1967) 15-16, describe Congress' function of "over[seeing] the administration," and note in addition to Congress' "authority to pass laws affecting agency," "less formal techniques, such as * * * informal communications between congressional and agency personnel."

Griffith, in *Congress—Its Contemporary Role* (4th ed. 1967), notes that dealing with constituents can take up to eighty percent of a Congressman's time, often to the extent of interfering with legislative tasks (p. 78), but he concludes (p. 79):

In a government as complex as ours, surely there is much to be said for the individual citizen having an advocate in his behalf if he feels in some fashion helpless before a gigantic bureaucracy. To serve in this manner is by no means the least important function of a Congressman.

Members of Congress and their aides—in common with everybody else—enjoy First Amendment protection in their speech and writing. *Hentoff v. Ichord*, 318 F. Supp. 1175, 1179 (D.D.C.). Thus, at the very least, if the communications concern a matter of public interest (*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29), they would be immune from both civil (*New York Times, Inc. v. Sullivan, supra*; *Time, Inc. v. Hill*, 385 U.S. 374) and criminal liability (*Garrison v. Louisiana*, 379 U.S. 64) for libel or invasion of privacy for republications in the absence of knowing or reckless falsehood. Further, in our main brief (pp. 37, 51–54), we suggest that when acting “within the outer perimeter of [the] line of duty” (*Barr v. Matteo*, 360 U.S. 564, 575), they might enjoy an absolute immunity from civil liability.

These “other protection[s]” (Gov’t Pet. App. A, p. 28) undercut Senator Gravel’s assertion that “[i]t is no exaggeration to say that this claim of the executive branch challenges the fundamental character of our tripartite system of government” (Gravel Br. 50). The First Amendment in its historic role as bulwark against criminal prosecution for seditious speech (*New York Times Co. v. Sullivan, supra*) is, in the first instance, a protection against executive excess. Thus legislators—in common with all citizens—have a wide degree of protection from criminal, as well as civil, liability for their speech. A legislator’s First Amendment rights take up where the Speech or Debate Clause ends, and both serve to protect the

separation of powers that the Senate and the Senator claim is threatened by this investigation.⁸

But these First Amendment and other protections do not immunize legislative aides⁹ from answering questions about republication before a federal grand jury. As this Court stated in *Blair v. United States*, 250 U.S. 273, 281, "the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned * * *." While this Court has recognized certain limits to the disclosure of information required by legislative committees (See e.g., *Sweezy v. New Hampshire*, 354 U.S. 234; *Gibson v. Florida Legislative Investigation Committee*, 372 U.S.

⁸ In a related separation of powers argument both Senator Gravel and the Senate try to distinguish the consistent line of cases limiting the Clause to its traditional scope (*Kilbourn*, *Dombrowski*, *Powell*) by observing that they were civil cases involving violations of "preferred constitutional rights [of individuals]" (Gravel Br. 49-50; see S. Br. 9), and characterizing the present case as a confrontation between the legislature and executive. However, *United States v. Johnson*, *supra*, involved the prosecution of a Congressman by the executive, yet this Court carefully limited the protection of the Congressman under the Clause to his speech-making and held his intervention with the Justice Department to be beyond the reach of the Clause. *United States v. Johnson*, *supra*, 383 U.S. at 172.

⁹ The government has made it clear throughout this litigation that it does not intend to subpoena Senator Gravel, even assuming it would be constitutionally permissible to question him with respect to the private republication through Beacon Press.

539), no such limitations of disclosure have been recognized with respect to testimony before grand juries.¹⁰

4. Senator Gravel and the Senate advance a number of arguments to support their claim that the immunity afforded members of Congress by the Speech or Debate Clause can be extended to bar inquiry of aides and third parties by a grand jury investigating the possible criminal liability of persons other than members. These arguments do not support the suggested conclusions. General observations about the separation of powers and the importance and usefulness of legislative aides are not a sufficient basis for establishing such an expansive interpretation of the Clause, in the face of a deliberate choice of the framers to limit its protections to Senators and Representatives themselves,¹¹ and in the face of the consistent holdings of this Court refusing to hold that Congressional employees are immunized by the Clause, although the rationale for their protection is virtually identical to that advanced with respect to aides. Since these points

¹⁰ Cf. *United States v. Caldwell*, pending on writ of certiorari, No. 50-57, *Branzburg v. Hayes*, pending on writ of certiorari, No. 70-85, and *In the Matter of Paul Pappas*, pending on writ of certiorari, No. 70-94, raising the issue of a newspaperman's privilege, under freedom of the press, to refuse to appear before a grand jury and divulge confidences. That is not an issue here.

¹¹ Senator Gravel characterizes the actual language of the Clause as stylistic (Gravel Br. 92; n. 123). If, as he urges, the framers regarded language clearly reaching only Senators and Representatives as not different in substance from the more general language of the English Bill of Rights, that surely suggests that they interpreted the English document to reach only members of Parliament, not that they meant to reach other persons by language not suited for that purpose.

are developed in our main brief, we respond here to certain narrower contentions which do not, upon examination, provide the support for Senator Gravel's position that is claimed.

The English authorities cited by Senator Gravel do not sustain a parliamentary privilege for third parties. *Per. v. Rule*, 2 K.B. 375 (1937) (Gravel Br. 104-105), allowed an appeal from a conviction for libels contained in communications from a constituent to a member of Parliament. The privilege applied by the King's Bench was not that of the member, but of the constituent. The case was governed by the common law doctrine of qualified privilege, a privilege which is well known on both sides of the Atlantic (see *Prosser, Torts* (2d ed. 1955) 618-619) and which depends in no way upon the parliamentary privilege of freedom of speech. The court held (2 K.B. at 379) that the communication "fell within the legal canon" that:

A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty.* * *.

Assuming the interest of Rule, the court merely held that the member of Parliament, like the Secretary of State for Home Affairs (with whom Rule was seeking an audience) had "a corresponding interest."

Ex Parte Wason, L.R. 4 Q. B. 573 (1868) (Gravel Br. 103-104), narrowly holds that two Lords and a third party can not be prosecuted for a conspiracy to have the Lords utter false statements in the House.

Noting that "statements made by members of either House of Parliament in their places in the House * * * could not be made the foundation of civil or criminal proceedings," Chief Justice Cockburn concluded that "a conspiracy to make such statements, would not make the persons guilty of it amendable to the criminal law" (L.R. 4 Q.B. at 576). The case stands for the principle that persons cannot be made criminally liable simply for agreeing that one of them will engage in behavior that cannot be made the subject of legal liability; it falls far short of establishing a general principle that the parliamentary freedom of speech can be invoked on behalf of third persons.

Neither do the English cases support Senator Gravel's view that legislative conduct cannot be inquired into in a judicial proceeding. Thus, while Parliament has asserted the right to punish its own members taking bribes (May, *Parliamentary Practice* (16th ed. 1957) 115-116), it has been asserted that such a member is "liable to prosecution in the same manner as bribed voters and persons corrupting them" (Bowyer, *Constitutional Law of England*, (2d ed. 1846) 90), and this view is supported by the Commonwealth cases to the limited extent that they consider the problem. *Rex v. Boston*, 33 Commw. L.R. 386 (Australia); *Regina v. White*, 13 S.C.R. 322 (N.S.W.); *Regina v. Bunting*, 7 Ont. Rept. 524 (Canada).

Senator Gravel and the Senate implicitly recognize that this Court's refusal to immunize Congressional employees in *Kilbourn v. Thompson*, 103 U.S. 168; *Dombrowski v. Eastland*, 387 U.S. 82; and *Powell v.*

McCormack, 395 U.S. 486, counts heavily against their position. They seek to distinguish those decisions on the ground that the employees were "effectuating unconstitutional legislative acts" (S. Br. 12; see also *Gravel* Br. 108). Their suggestion is that inquiry into criminal but not constitutionally prohibited acts is an interest of a lesser order than inquiry into constitutional violations.

But it would be unsound to distinguish between "nonconstitutional" and "constitutional" harms in deciding what claims may give rise to an adjudication on the merits and to possible redress. For the most part, the Constitution is violated only when there is an act under color of authority of the government. Many public acts of individual members of Congress are not acts of the government in the relevant sense. Thus, if an aide (with the member's approval) conspired to get police officers to make an unlawful search for documents, there would be a constitutional violation; but if the aide hired a private "thug" to break in and steal documents, that would not be a constitutional violation. The victim's chance of recovery and the applicability of the Speech or Debate Clause cannot turn on such a distinction.

There is also the intimation in both briefs (S. Br. 12; *Gravel* Br. 107-108) that *Kilbourn*, *Dombrowski* and *Powell* may be distinguishable because they involved redress of individual rights, whereas this case involves inquiry into criminal liability. If the suggestion is that redress of civil wrongs to individuals is more important than enforcement of the criminal law,

it ignores the fact that effective enforcement of criminal statutes is a cornerstone of individual security and liberty in any free society. If the suggestion is that any attempt to enforce the criminal law that involves inquiries about conduct with which a Senator may be concerned is necessarily a conflict between the legislative and executive branches and thus lies at the core of the historic legislative privilege, it is artificial.

Senator Gravel urges (Gravel Br. 100-103) that *United States v. Johnson*, 383 U.S. 169, substantiates his contention that aides and private persons can not be asked about matters touching on his legislative activities. But as we point out in our main brief, the Supreme Court considered that case only in the context of the conviction of Congressman Johnson himself; it addressed itself only to what kind of evidence could be the basis for the conviction of a Congressman. The very same evidence which the Court held wrongly introduced as to Johnson had also been instrumental in the conviction of his private co-conspirators. The court of appeals held their conviction to be without error, 337 F.2d 180 (C.A. 4), and this Court did not suggest that this determination was erroneous. This case does not call for a determination that Senator Gravel's legislative acts are admissible in a prosecution against him; but only that, as the court of appeals held in *Johnson*, information touching on those acts is not absolutely immune from inquiry in investigation of the possible criminal acts of other persons.¹²

¹² Senator Gravel suggests (Gravel Br. 127) that aides and third parties are subject to discipline much like members of Congress, citing *Anderson v. Dunn*, 6 Wheat. 204. However,

Perhaps the difficulties of Senator Gravel's position in this case are best summed up by a short paragraph that points toward but then fails to accept the obvious implication of much of his argument. That paragraph (Gravel Br. 93) reads:

In fact, we will assume that if the Senator personally had "stolen" the Pentagon Papers, and if such an act were a crime, then he could be prosecuted for that criminal act. Certainly, then, aides and other assistants could likewise be prosecuted.

If aides and assistants could be prosecuted for stealing documents at the Senator's direction, even though these documents were to be used in Speech or Debate, then surely such aides could be prosecuted for knowingly receiving documents stolen by a private person. Surely also a private person could be prosecuted for stealing the documents even though relevant testimony might touch on his contacts with members of a Senator's staff. If this is conceded, how can it be persuasively contended that a grand jury would be barred from inquiring whether an aide has knowledge of who has stolen documents or whether the aide himself has incurred criminal liability by receiving the documents or conspiring with the thief? Although this hypothetical situation is simpler than the relevant law and

while Congress may have the power to punish directly contemptuous acts committed by nonmembers before Congressional bodies, Congress has never asserted a power over employees of individual members analogous to its constitutional right to discipline the members themselves (U.S. Constitution, Art. I, § 5).

probable facts concerning the acquisition and unauthorized distribution of the "Pentagon Papers," it is close enough to suggest the unworkability of the distinction between liability for theft and grand jury inquiry that Senator Gravel attempts to draw.

The extraordinary powers to confer immunity that Senator Gravel's argument would grant to members of Congress can not so easily be ignored. These powers, as we argue in our main brief, are not warranted by constitutional language, history or the legitimate needs of Congress for protections that will assure its effective functioning.

Respectfully submitted.

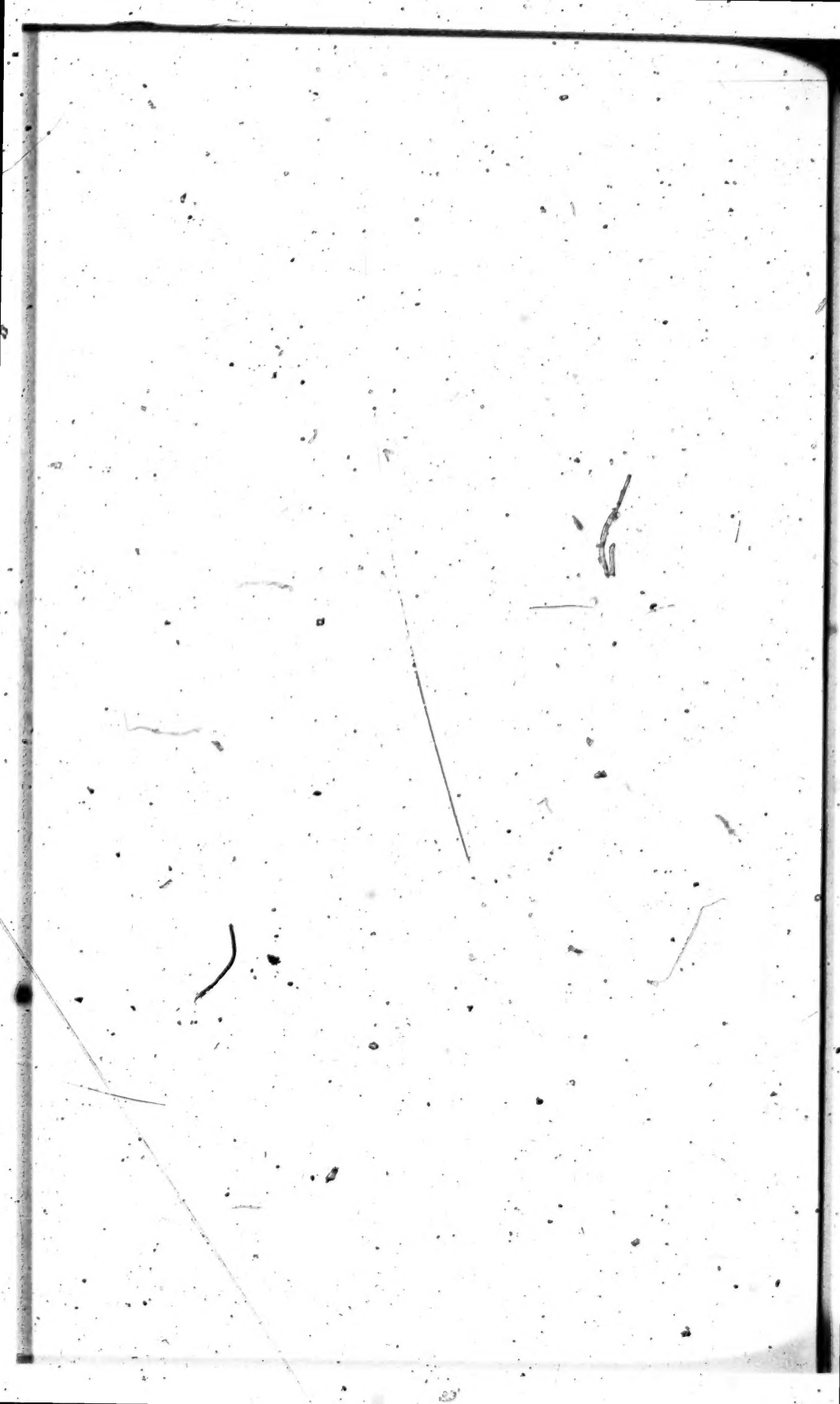
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1017, 71-1026

Supreme Court, U. S.
FILED

APR 14 1972

MIKE GRAVEL, United States Senator,

MICHAEL RODAK, JR., CLERK
Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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Petitioner,

—v.—

MIKE GRAVEL, United States Senator,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

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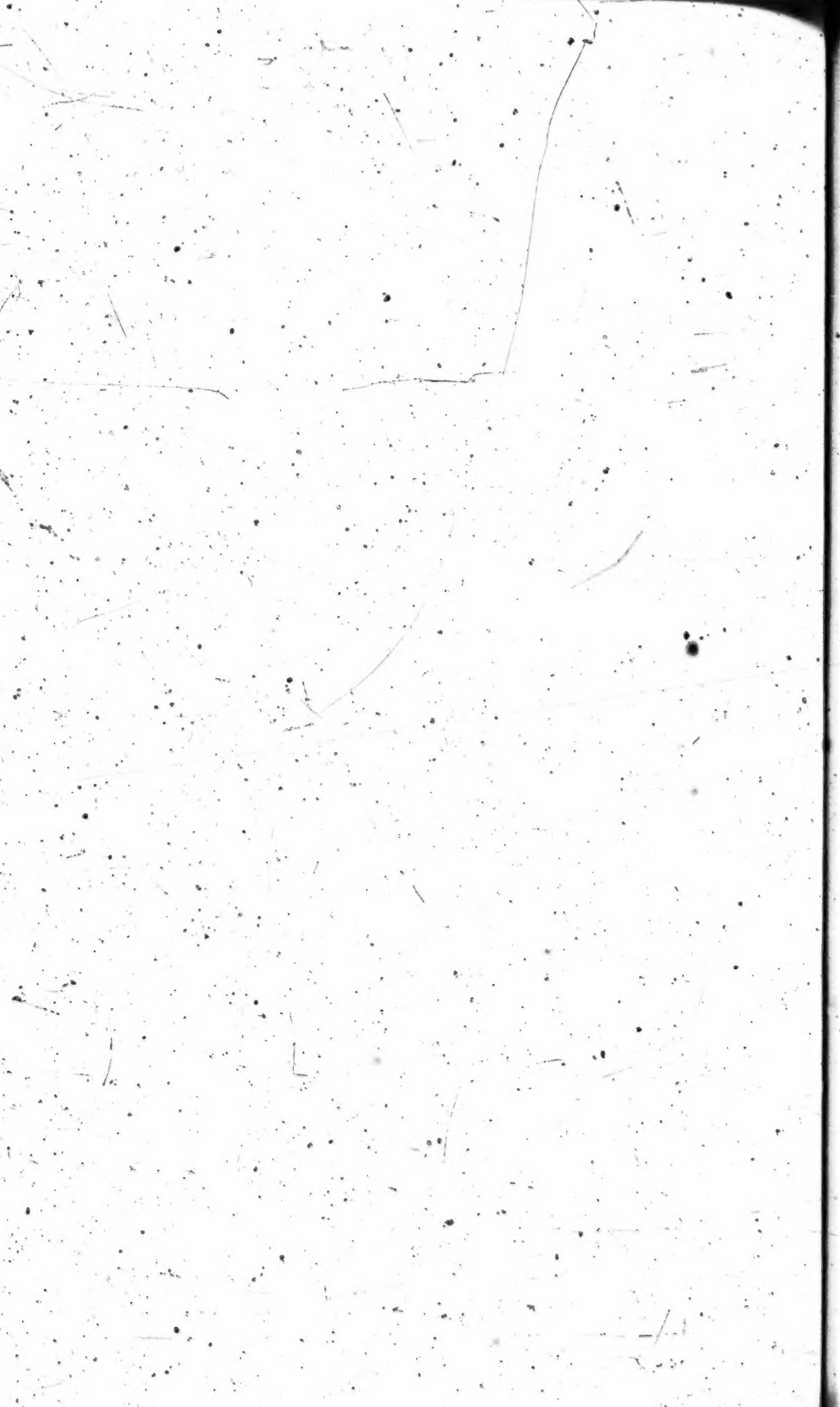
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COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

Interest of Amicus*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 170,000 members dedicated solely to defending the liberties guaranteed by the

* Letters of consent, from counsel for the Government and Senator Gravel, to the filing of this brief have been filed with the Clerk of the Court.

Bill of Rights. The issues in this case involve a conflict between two important civil liberties principles: the requirement that a substantial degree of accountability be imposed upon public officials and the need for an independent legislative branch which will act to assure an informed citizenry. The purpose of this brief is to suggest principles for the resolution of these competing claims.

Summary of Argument

The purposes of the Speech or Debate Clause, and the balance of power between executive and legislature which it was designed to maintain, require a presumption in favor of strong legislative immunity from inquiries of the kind pursued here. This is particularly so when the actions being investigated by a grand jury involve a Senator's efforts to inform the public about the central political issue of our time.

I.

The primary purpose of the Speech or Debate Clause is to insure an independent legislature safeguarded against executive wrath. Accordingly, the cases make it clear that when acting within the legislative sphere, members of the Congress are immune from inquiry. This immunity extends beyond the halls of Congress and encompasses the type of public action involved here.

II.

Whether a similar immunity is available to legislative aides depends upon the purposes to be served by questioning the aide and the reasons advanced for breaching the

immunity. Where legislative employees are proceeded against in suits by private citizens seeking redress for the legislative denial of constitutional rights, the societal interests in vindicating those rights and the institutional requirements of judicial review have caused courts to refuse to grant immunity. However, where, as here, the purpose and effect of questioning aides and third persons will be to penalize legislative activity of a high order—informing the public—the general presumption of immunity must obtain.

ARGUMENT

Introduction

The precise issues in this case are framed in terms of the reach and scope of the Speech or Debate Clause contained in Article I of the Constitution. But their resolution implicates a clash between two larger contending values. On the one hand, there is the important societal interest in imposing upon public officials and their aides, be they legislative or executive, a substantial degree of accountability for their actions. On the other is the requirement, particularly important in our democratic society, that legislators have the independence and immunity which helps insure that representative government will be a reality. Both sets of values are central to the advancement of those civil liberties with which the American Civil Liberties Union is institutionally concerned. Blanket immunity of public officials from judicial scrutiny is an invitation to arbitrary government. Timidity by legislative officials is inconsistent with representative government.

On balance, the presumption must be in favor of a broad legislative immunity for a number of reasons. First, of

course, the Speech or Debate Clause provides specific textual and historical support for such a view. Second, in practical terms, the capacity for mischief as a result of broad legislative immunity is far less than the dangers involved in affording a similar immunity to the executive branch. Finally, and most importantly, recent American history has witnessed a significant accretion of executive power at the expense of legislative authority. This has been particularly true with regard to the overriding issues of foreign and military policy. Accordingly, the claim to legislative immunity is singularly forceful when it is interposed to prevent executive inquiry into the events surrounding a legislator's publication of a history of the Vietnam war.

But there is a key limiting principle to the presumption of absolute legislative immunity. Whenever legislative action invades or deprives *private citizens* of constitutionally protected rights, then the presumption must give way. Accordingly, while legislators themselves probably remain immune from suit brought by such individuals, courts have frequently—and properly—refused to confer such immunity upon aides or others sued for specific infringement of constitutional rights. In this fashion the interests in judicial review and redress of violations of constitutional rights by the legislative branch, as well as the need for legislative immunity, are reconciled. But where, as here, the breach of legislative immunity is not sought in order to vindicate a private citizen's constitutional rights, then the analytic presumption of absolute legislative immunity is not defeated.

Finally, we suggest that the analysis of the executive branch's effort to breach legislative immunity in this case cannot be divorced from considerations of the kind of investigation being conducted and the forum in which it

occurs. First, the fact that it is a grand jury which is seeking information provides no additional support for the inquiry. As this Court knows, there are numerous exceptions to what the government characterizes as "the normal duty of all citizens to testify before the grand jury about any matter of which they have knowledge." (Goy't Brief, p. 54.) Moreover, and unfortunately, it is questionable whether federal grand juries today can still be regarded as "a primary security to the innocent against hasty, malicious and oppressive persecution . . ." *Wood v. Georgia*, 370 U.S. 375, 390 (1962). See generally, F. J. Donner and E. Cerruti, "The Grand Jury Network," *The Nation*, January 3, 1972, pp. 3-20.

But most importantly, it must be remembered what "crimes" this grand jury was investigating. This was not an inquiry into influence peddling by Congressmen or their aides. It was an attempt to ascertain those persons responsible for disclosing the Pentagon Papers to the American people. No incantation of the specific provisions of the federal criminal code alleged to have been violated should obscure that fact. It has been our position that the American people were absolutely entitled to receive the information contained in those documents. See Brief of the American Civil Liberties Union, *Amicus Curiae*, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), at pp. 17-19. The Government's continued effort, first to frustrate that result and now to punish those who made it possible, is a fundamental breach of the common national understanding that the people have the right to know what their government is doing. Senator Gravel, as well as those who assisted him, was implementing this common bond.

If, as the government's actions seem to imply, neither the press nor the legislature is constitutionally entitled to tell us about the policies of our government, who is?

I.

The central purposes behind the Speech or Debate Clause immunize Senator Gravel from inquiry concerning the publication of the Pentagon Papers.

Senator Gravel's brief contains an exhaustive analysis of the history and purposes of the Speech or Debate Clause, and we can add little to it. The important point to note is that the inquiry which the government here pursues is the paradigm of the kind of evil which the Clause was intended to prevent, namely an attempted breach by the executive branch of the constitutional separation of powers.

The legislative privilege embodied in the Speech or Debate Clause grew out of historic disputes between members of the English Parliament and the Crown. It was designed to protect the legislators from the King's wrath, so that they would not be deterred from discussing and acting upon the issues of the day. A shield against intimidation, the privilege was meant to insure the independence of the legislature. See, Comment, 43 N.Y.U. L. Rev. 1227 (1968). When added to our Constitution in the Speech or Debate Clause, the privilege had the same purpose. In explaining that purpose, this Court in *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951), quoted the writings of James Wilson, a member of the Committee of Detail which had been responsible for addition of the Clause to the Constitution:

In order to enable and encourage a representative of the public to discharge his public trust with firm-

ness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech and that he should be protected from the resentment of everyone. . . . 1 *The Works of James Wilson*, 421 (R. McCloskey ed., 1967).

In light of this clear purpose of the Clause, there can be little quarrel that Senator Gravel cannot be questioned with regard to anything he says or does on the floor of the Senate, *Tenney v. Brandhove*, *supra*; *United States v. Johnson*, 383 U.S. 169 (1966), nor for any written reports of committee proceedings addressed to Congress, including printed material inserted directly into the record. *Kilbourn v. Thompson*, 103 U.S. 168; 204 (1881). Nor can he be questioned about his actions at the meeting of the Subcommittee on Buildings and Grounds on June 29, 1971. Finally, since effective debate presupposes access to facts, the Speech or Debate Clause also grants immunity from inquiries which would restrict acquisition of information. See Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 30 Harv. L. Rev. 153, 205-06 (1926); cf. *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), cert. granted, 402 U.S. 942 (1971). Accordingly, it is with good reason that the Government seems to have abandoned its earlier intention to subpoena the Senator.

Perhaps the only significant issue with regard to Senator Gravel's immunity is whether the Clause protects him from inquiry as to his efforts to effect the publication of the Pentagon Papers by Beacon Press.

The Papers having been read into the public record of the Senate subcommittee by Petitioner, were in the public domain. We think that the Court of Appeals, therefore, was in error when it asserted that because the

function of Petitioner's subcommittee was unrelated to the contents of the Pentagon Papers, it stood outside the protection of the Speech or Debate Clause. But the occasions when a court has examined the powers of a legislative committee have been limited to cases in which the power of Congress under the Constitution has been in issue, e.g., *Kilbourn v. Thompson*, *supra*, or where the constitutional rights of individuals have been jeopardized by Congressional action, as in cases of contempt of Congress, e.g., *Watkins v. United States*, 354 U.S. 178 (1957).

Accordingly, the Speech or Debate Clause clearly protects such legislative activities as obtaining material for committee hearings, *Dombrowski v. Eastland*, 387 U.S. 82 (1967), conduct at the hearings, *Tenney v. Brandhove*, *supra*, and Committee resolutions and votes, *Powell v. McCormack*, 395 U.S. 486, 502-503 (1969). And several courts have held that the Speech or Debate Clause affords complete protection to Congressmen with regard to the publication of committee records. *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729 (D. D.C. 1956); *Hentoff v. Ichord*, 318 F. Supp. 1175 (D. D.C. 1970); *Doe v. McMillan*, — F.2d —, 40 Law Week 2471 (D.C. Cir. 1972, No. 71-1027). Cf. *Hearst v. Black*, 84 F.2d 68 (D.C. Cir. 1936).

Although these cases involved publication by the Public Printer, they are in no way different from the present case. Many Congressmen and public officials now customarily use private means to disseminate reports and records in order to reach the widest possible public. Only in this way can our electorate remain informed and our legislators properly fulfil their role relating to the due functioning of the legislative process. Petitioner's action in arranging for the publication of the Pentagon Papers is in exactly the

same position as that of all members of Congress, who routinely inform their constituents by issuing press releases and by circulating copies of their speeches and committee records and reports.

Finally, since the information publicly distributed is not of the kind which directly infringes the constitutional rights of private citizens, there is no occasion for consideration of the limiting principle on a legislator's immunity.

II.

The purposes of the Speech or Debate Clause require that Congressional aides be immune from the kind of inquiry pressed here.

The Court of Appeals held, in effect, that Congressional aides are entitled to an immunity under the Speech or Debate Clause coextensive with that of the Congressman they serve. For reasons set forth *infra*, we suggest that while such a result is required in this type of case, there are instances where such equivalence of immunity should not be allowed. In essence we submit that the differing results would turn on the purpose to be served by making the inquiry and the reasons offered for breaching the immunity. Where, as here, the primary purpose of the inquiry of the aide is to weaken the separation of powers between the executive and legislative branches, that inquiry cannot be allowed.

The Government seems to argue that the case turns on the formal distinction in status between a member of Congress and an aide or employee. To be sure, that distinction is important. The Clause itself speaks only of "Senators and Representatives," and many cases have honored the

member's claim of immunity, while rejecting the aide's. But the status of the person proceeded against is only the beginning of the inquiry, not the end.

In several important cases this Court and the lower federal courts have refused to hold that the Clause confers on legislative employees immunity *from suits brought by private citizens seeking redress for the legislative denial of constitutional rights*. We think this qualification is vital to an explanation of the various decisions under the Clause. For in none of the cases where civil suits were allowed to proceed against legislative employees was the central purpose of the Clause being undermined. To the contrary, in all those cases the plaintiffs were seeking to override the claim of legislative privilege in order to vindicate constitutional right, and the courts were discharging their institutional responsibility of judicial review of formal legislative actions.

Thus, in the earliest of this Court's decisions, *Kilbourn v. Thompson, supra*, the Court held that the Speech or Debate Clause barred the conclusion that Congressional defendants were personally liable in a false imprisonment action brought by a recalcitrant witness who had been confined pursuant to a House Resolution. However, the Court did proceed to adjudicate the merits of the plaintiff's complaint. And it held that passage of the Resolution and incarceration of the plaintiff had been unconstitutional. The Court permitted the injured witness to sue the House Sergeant-at-Arms who had simply executed the warrant of arrest at the direction of his Congressional employers.

A similar result was reached in *Dombrowski v. Eastland*, 387 U.S. 82 (1967). There the petitioners claimed that a Senator and his subcommittee counsel had entered into a

conspiracy to violate petitioners' Fourth Amendment rights. With regard to the Senator, this Court found no evidence of his involvement in actions beyond the sphere of legitimate legislative activity and, accordingly, upheld his claim to immunity under the Clause. But this Court declined to extend the same cloak of immunity to the staff employee, whose presence as a defendant enabled appropriate judicial scrutiny of the challenged Congressional activity.

These doctrines received the closest attention in *Powell v. McCormack, supra*. The Court adjudicated the constitutionality of the actions taken by Congress and held that the exclusion of Congressman Powell had been unlawful. In reaching this result, the Court held that the suit could be maintained against the Congressional employees, although not against the Congressmen themselves:

The Court first articulated in *Kilbourn* and followed in *Dombrowski v. Eastland* the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts. . . . *That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision.* . . . [T]hough this action may be dismissed against the Congressmen, petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell. 395 U.S. at 504-506. (Emphasis added.)

This understanding has been reflected in lower court decisions as well. See, *Stamler v. Willis*, 415 F.2d 1365 (7th

Cir. 1970) ("The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government. . . . The Congress has no more right, whether through legislation or investigations conducted under an overbroad enabling Act, to abridge the First Amendment freedoms of the people, than do the other branches of government" *Id.* at 1370); *Davis v. Ichord*, 442 F.2d 1207 (D.C. Cir. 1970) ("This judicial admonition [against judicial interference with legislative investigations], however, enunciated in cases which involved only part of the spectrum of the judiciary's responsibility in relation to Congress, must be read with decisions of the Supreme Court where individual rights were alleged to be infringed by Congress in circumstances which required constitutional adjudication." *Id.* at 1213); *Doe v. McMillan*, — F.2d —, 40 Law Week 2471 (D.C. Cir. 1972, No. 71-1027) (dissenting opinion at Slip Op. pp. 29-37); *Hentoff v. Ichord*, 318 F. Supp. 1175 (D. D.C. 1970).

The typical pattern of these cases is apparent. Overt, formal legislative action is alleged to have infringed constitutional rights. Suits, usually injunctive, are filed against members and staff employees. The action is not allowed as to the member, but proceeds against the employee, thus enabling judicial review to go forward to adjudicate the constitutionality of actions of a coordinate branch of government. The presence of the Congressional employees provides the means to secure judicial review of the constitutionality of the underlying action, without inhibiting Congressmen in their duties. See *Powell v. McCormack*, *supra* at 506.

Consequently, those decisions holding that the Speech or Debate Clause does not provide an immunity defense to legislative employees must be read in light of their rationale, that withholding immunity is required in order to vindicate constitutional rights and to effectuate judicial review. This doctrine is in accord with the general constitutional impulse to provide remedies for violations of such rights, see *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the exception to immunity is justified.

The situation here is precisely the converse. No constitutional rights are sought to be advanced by the government. Rather, information is sought in order to punish persons engaged in or assisting legitimate legislative activity of a high order of importance—informing the public about the foreign policy decision-making process. The historical purposes of the Clause are attacked by this inquiry, the normal presumption of legislative immunity should prevail, and the member's absolute immunity should encompass the aide.

The distinction we urge is simple: legislative aides have no immunity to act unconstitutionally against private citizens, but they do have immunity from inquiry as to their role in implementing legitimate legislative activity.

CONCLUSION

Having failed to restrain the publication of the Pentagon Papers, the government now seeks to identify and punish those who may have assisted in making those documents available to the public. In this case, the policies of the Speech or Debate Clause, as well as those of the First Amendment, require that the effort be interdicted and the subpoenas be quashed.

Respectfully submitted,

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April 1972

70L 19 1972

Supreme Court of the United States

OCTOBER TERM, 1971.

Nos. 71-1017

71-1026.

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Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR REHEARING.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR REHEARING.

Mike Gravel, United States Senator, petitioner in No. 71-1017 and respondent in No. 71-1026, herein respectfully moves this Court for an order (1) vacating its opinion and

order entered in these causes on June 29, 1972, and (2) granting the petition for rehearing. As grounds for this motion, petitioner states the following:

1. Rehearing should be granted because Mr. Justice Rehnquist improperly participated in the decision of these cases, and his vote was crucial to the outcome.

In the circumstances of these cases, it was entirely improper for Mr. Justice Rehnquist to participate in the decision. It has long been accepted that judges who may so much as appear to have an interest in the outcome of litigation due to their participation in the events involved in the litigation prior to their ascending the Bench should voluntarily disqualify themselves from participation in the decision of such cases. For the most part, American jurists have been careful to avoid even the appearance of impropriety in this regard,¹ and the citizens of the United States have thus been assured that their cases and controversies will be resolved by jurists free from any bias or pre-disposition.

We respectfully submit that Mr. Justice Rehnquist's prior involvement in the subject matter of this litigation, while serving as Assistant Attorney General in charge of the Office of Legal Counsel of the Justice Department, constitutes precisely the kind of situation which mandates disqualification.

¹ See Canons of Judicial Ethics, adopted by the American Bar Association on July 9, 1924:

"Canon 4. A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach."

The core of this case, of course, centered around the attempts by a United States Senator to make available to his colleagues and to the public the contents of the so-called "Pentagon Papers." These papers were considered by the Senator to be highly critical of Executive actions with respect to the war in Indochina, and to reveal deception and incompetence on the part of the Executive. Senator Gravel obtained these papers and placed them before his Subcommittee on Buildings and Grounds at a time when several installments of a *New York Times* series based on the Papers had been published, but while proceedings initiated by the Executive to have further publication enjoined were progressing through the courts. And indeed on the very date of the Subcommittee hearing and placement of the Papers in the Subcommittee record, the case was under consideration by this Court, and a temporary restraining order against publication entered by this Court was still in full force and effect. That restraining order, and a possibly adverse decision in the case, were seen by Senator Gravel as potentially depriving his colleagues and constituents of access to the information contained in the Papers. The release of the Papers through senatorial channels by Senator Gravel followed.

Needless to say, Senator Gravel's and the newspapers' views as to the legality and advisability of releasing these Papers differed diametrically from the view held by the President and the Attorney General. In formulating both its policy with respect to release of the Papers, and its strategy for implementing and vindicating its policy, the Executive sought and received the advice and assistance of Mr. Justice Rehnquist in its attempt to suppress this material from being publicly disclosed.

Acting in his capacity as legal advisor to the Justice Department, Mr. Justice (then Assistant Attorney General) Rehnquist prepared a memorandum analyzing the legal

merits of an attempt by the Government to seek an injunction to suppress publication. Such an attempt was in fact thereafter made, resulting in this Court's opinion in *New York Times Company v. United States*, and *United States v. The Washington Post Company*, 403 U.S. 713 (1971). It is quite likely that Mr. Justice Rehnquist's memorandum significantly affected the Justice Department's decision to proceed in its attempt to obtain an injunction. Mr. Justice Rehnquist testified at his own confirmation hearings that he personally approved and supported the Justice Department's actions:

"I do not want to leave in anyone's mind the idea that after I had looked at *Near v. Minnesota* and read its language that I was in any way opposed to the Government doing what it did, presenting this issue to the court for decision."

Hearings before the Senate Committee on the Judiciary, 92d Cong., 1st Sess., nominations of William H. Rehnquist and Lewis F. Powell, Jr. (1971), at 41. See also *id.* at 38-40.

This degree of involvement in itself is surely sufficient to require disqualification of a justice in a case involving a grand jury investigation of the subsequent release and public disclosure of precisely these documents by Senator Gravel and the press, including the Beacon Press. The matter is further exacerbated by the fact that the party initiating the actions against *The New York Times* and *The Washington Post*, i.e., the Justice Department, is the very party that initiated the grand jury investigation of the Gravel release of the papers. Furthermore, Mr. Justice Rehnquist was in charge of the Office of Legal Counsel of the Department of Justice both when the *Times* litigation was launched and when the Boston grand jury was convened. Counsel for Senator Gravel further has reason to believe, and states on

information and belief, that as Assistant Attorney General, Mr. Justice Rehnquist assigned one of his assistants to work with Robert Mardian, head of the Internal Security Division of the Department of Justice, to investigate all matters related to the release of the Papers and to convene the Boston grand jury.

Moreover, Mr. Justice Rehnquist's involvement in the Pentagon Papers case went even beyond the strict confines of the duties of his position as legal advisor to the Justice Department. When asked about his involvement in the case, Mr. Justice Rehnquist told the Senate Judiciary Committee only of the memorandum which he had prepared and of a strategy conference which he had attended. Hearings, *supra*, at 38-41. Yet an article appeared on June 19, 1971, in *The Washington Post*, stating as follows:

"Assistant Attorney General William H. Rehnquist, in a telephone call to *The Post's* executive editor, Benjamin C. Bradlee, asked the paper to discontinue publication of the articles. The department 'respectfully asked us to desist and we respectfully declined' Bradlee said." (Page A12, col. 4.)

When questioned at his confirmation hearings concerning his role in the Justice Department's efforts to prevent publication of the Pentagon Papers, Mr. Justice Rehnquist did not disclose this telephone call and conversation. However, upon being asked specifically to admit or deny this incident by a subsequent letter written by three members of the Judiciary Committee, Mr. Justice Rehnquist replied:

"At the request of the Attorney General on a date which I believe was Friday, June 18, I telephoned Mr. Ben Bradlee, Executive Editor of *The Washington Post*, and requested on behalf of the Justice Department that the *Post* refrain from further publication of

these papers. Mr. Bradlee told me that the *Post* would not accede to this request."

Hearings, *supra*, at 488-489. Some members of the Committee felt that Mr. Justice Rehnquist had been "less than candid" in revealing the magnitude of his involvement in the litigation. See, e.g., *Congressional Record*, S. 20552 (December 3, 1971) and S. 21242 (December 10, 1971).

This personal intervention in the cases, combined with the advice and assistance given to the President and to the Attorney General, necessitates the disqualification of Mr. Justice Rehnquist in these cases, which are so intimately entwined with his past actions and involvements as Assistant Attorney General.

Under these circumstances, Mr. Justice Rehnquist's involvement in the Court's decision of these cases is, we submit most respectfully, entirely unseemly and improper, particularly so in view of the crucial fifth vote supplied by him, a vote which substantially reversed the opinion of the court below.

We therefore respectfully ask the Court to grant this petition for rehearing and to hear the case without the participation of Mr. Justice Rehnquist. We address this motion to the Court, and not to Mr. Justice Rehnquist individually, because, first, it is a request for rehearing which is properly acted upon by the Court and not by a single justice, and second, because the Court as a whole has both the power and the duty to enforce federal statutes with respect to disqualification of justices and to enforce the canons of judicial ethics with respect to its own members.

In earlier times there was some question as to the power of the Court to enforce standards of judicial propriety upon its own members. In *Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America*, 325 U.S. 897 (1945), a petition for rehearing was filed on the ground

that a justice improperly participated and cast the deciding vote. The petition, addressed to the entire Court, was denied without explanation. Justices Jackson and Frankfurter concurred in the denial because they believed that "the complaint is one which cannot properly be addressed to the Court as a whole" *Ibid.* The concurring justices continued:

"No statute prescribes grounds upon which a justice of this Court may be disqualified in any case. The Court itself has never undertaken by rule of Court or decision to formulate any uniform practice on the subject." *Ibid.*

Since only two justices concurred in this statement, it was unclear whether the Court's refusal to rehear the *Jewell Ridge* case was based upon the Court's view that it did not have the power to disqualify a justice, or upon the Court's view that the asserted improper conduct of the justice was indeed proper.

In evident response to the uncertainty generated by this controversy, Congress passed a statute, 62 Stat. 908, 28 U.S.C. 455 (June 25, 1948), which sets mandatory standards for the disqualification of judges, including justices of this Court. That statute provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

It is clear without doubt that this statute is mandatory in nature and leaves the matter of disqualification to the

"opinion" of the justice involved *only* in situations where he "is so related to or connected with any party or his attorney as to render it improper . . . for him to sit on the trial, appeal, or other proceeding therein." Naturally, in such a case, only the justice involved would be expected to have the most complete and accurate knowledge of the details of his relationship with such party or attorney, and would be expected to act in good faith in deciding whether or not that relationship merited disqualification. But the statute makes it crystal clear that in cases where a justice "has been of counsel" in the case, he "shall disqualify himself." There can be no dispute that Mr. Justice Rehnquist acted of counsel to the chief litigant in all of the "Pentagon Papers cases."² For lower court decisions construing the term "of counsel" in similar cases, see *United States v. Amerine*, 411 F. 2d 1130 (6th Cir. 1969); *United States v. Vasilick*, 160 F. 2d 631 (3d Cir. 1947) ("But where, as here, a judge of a district court has been of counsel for a party in the case pending before him, his disqualification is not a matter for the exercise of his own discretion but is unconditional and absolute." 160 F. 2d at 632).

There is no reason to believe that this Court lacks the power to enforce Section 455 in an appropriate case. Other

² Indeed, Mr. Justice Rehnquist virtually conceded as much in the course of the hearings on his nomination. Senator Bayh asked Mr. Justice Rehnquist whether he agreed with the following statement which had been prepared by Mr. Justice White when the latter was in the Department of Justice:

"From the foregoing, it seems clear that a government attorney is of counsel within the meaning of 28 U.S.C. 455 with respect to any case in which he signed a pleading or a brief, even if it is merely a formal act, and probably should be regarded as of counsel if he actively participated in any case, even though he did not sign any pleading or brief."

Mr. Justice Rehnquist responded: "Well, I concur in that general evaluation." Hearings, *supra*, at 74.

courts of last resort, such as the International Court of Justice, pass upon motions for disqualification of its members. See W. M. Reisman, *Nullity and Revision—The Review and Enforcement of International Judgments and Awards*, 489-517 (Yale University Press, 1971). And surely, for example, were it to be revealed that a justice of this Court had been bribed to cast the deciding vote in a case, manifestly this Court would have no hesitation in refusing to let the opinion stand as the supreme law of the land. Certainly venality is not the only circumstance which can cast doubt upon the propriety and integrity of judicial action.

Inasmuch as Mr. Justice Rehnquist's participation in this litigation was in violation of Section 455 and of the Canons of Judicial Ethics, we respectfully request the Court to grant the petition for rehearing.

2. The Court has decided an issue of momentous importance—that the acquisition of information by a Senator for use in official Senate proceedings is not privileged—which was neither raised, urged, briefed nor argued, by any of the parties or by the United States Senate as *amicus curiae*.

The Court decided in a single sentence, without any analysis or explanation, an issue which is of momentous importance in relation to the due functioning of the United States Senate as an informed and co-equal branch of Government, and which issue was neither raised by any party in the cross petitions for writs of certiorari, nor urged at any stage of the case, nor briefed, nor orally argued. The Court held:

“Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing

the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions."

Slip opinion at 21.

It is important to note that while the Court held that the Senator's "republishing" of the Papers did not constitute a "legislative act" within the protection of the Speech or Debate Clause, nevertheless the Court did not hold that the Senator's acquisition of the Papers did not constitute a legislative act. Nor in fact could the Court so hold, since it must be undisputed that the primary reason the Senate has committees is to enable the body, via the committees, to acquire information which is absolutely essential in order to enable the Senate to deliberate intelligently over the important issues of the day and to pass legislation which is found to be necessary.

The Court held that "republishing" was not protected because it was "in no way essential to the deliberations of the House. . . . The Senator had conducted his hearings, the record and any report that was forthcoming were available both to his committee and the House." Slip opinion at 19. Clearly, the acquisition of information by a Senator and by his subcommittee is "essential to the deliberations of the House" and is a *sine qua non* to the conduct of the hearings and the preparation of "the record and any report." The necessity of assuring the free flow of information to the Congress cannot be underestimated, for, as Dean Landis has stated: "To deny Congress to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness." Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. Law Rev. 153, 209 (1926). Dean Landis' observations that the deliberative processes of Congress, as well as our system of separation

of powers itself, are dependent upon the ability of legislators to receive, without restraint, information concerning the administration of government, are so self-evident as to be incontrovertible.

"It needed no argument for Montesquieu to conclude that a knowledge of the practical difficulties of administration was a *sine qua non* of wise legislative activity. But such knowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. The electorate demands a presentation of the case; it requires, even though its comprehension be limited by its capacity, the chaos from which its representative has claimed to have evolved the order that betokens progress. The very fact of representative government thus burdens the legislature with this informing function. Nevertheless its first informing function lies to itself, a necessary corollary of any legislative purpose. Knowledge of the detailed administration of existing laws is not merely permissive to Congress; it is obligatory." *Id.* at 205-206 (footnotes omitted).

Petitioner wishes to emphasize that he need not now necessarily dispute the standard by which Speech or Debate Clause protection should be accorded acts of legislators. While Senator Gravel adheres to the arguments he made before the Court initially, and while Senator Gravel finds absolutely no precedent in either history or case law

for the extraordinarily narrow reading of the Clause given by the Court, nevertheless, even under such a restrictive standard it is eminently clear that neither the Senator, nor his aides nor other parties, may be questioned about the Senator's acquisition of information for a subcommittee hearing.

As we have noted, *supra*, the very purpose of Congressional committees is to enable the body to acquire needed information. This is evident not only from a practical knowledge of the workings of the legislative branch, but it has been recognized by this Court in *Dombrowski v. Eastland*, 387 U.S. 82 (1967), where a Senator was held to have engaged in privileged conduct when he issued a subpoena for the production of documentary material and information for his subcommittee. While the subcommittee's counsel was held not protected for unauthorized conspiratorial acts to obtain information in violation of individual rights, 387 U.S. at 84, *Gravel v. United States*, slip opinion at 13, nevertheless the Senator, having not been found to be involved in the conspiracy, was held privileged and immune. Certainly within this framework, the mere receipt of material by a Senator, as in the case at bar, with no allegation that he himself, or others at his command, participated in any illegal scheme for acquiring the material, must be considered to fall precisely within the protected area, as was the activity of Senator Eastland. Issuing a subpoena is one common method for a subcommittee to obtain information. Receiving information volunteered by citizens or anyone else is another common method. Indeed, in many instances, a Congressman cannot subpoena material, because he does not know enough to know where, to whom, and with respect to what documents to direct a subpoena. It is only after the receipt of certain threshold information that is volunteered to him that he knows where to turn; and this applies especially in situations where the Executive attempts to

cover up or misrepresent the facts. For this Court to determine which methods shall and which shall not be used is to embroil the Court in a political thicket, and to strike a blow at a co-equal branch, which can do neither the judiciary nor the legislature any good. It is even doubtful that every Member of the Senate will see fit personally or via his aide to obey a grand jury subpoena where a Senator might feel that he would be compromising the ancient and heretofore undoubted prerogatives of the legislature and of the Sovereign People whom he represents. This is the material of which constitutional crises are made.

The consequences of this holding cannot be overestimated. For example, recent hearings have been held by the Senate Foreign Relations Committee, prompted by information supplied in confidence to the Committee's chairman, which have revealed that the Executive was supporting military operations in Laos and Cambodia in direct violation of statutes passed by the Congress and signed by the President. Is it conceivable that our Constitution permits the Executive, with the aid of the judiciary, to haul the Chairman of the Foreign Relations Committee before a federal grand jury, to interrogate him as to the sources of his information, to throw him in jail if he refuses to cooperate and to threaten him with indictment and prosecution?³

³ An independent legislative branch should not have to depend upon the good faith of the Executive branch under a system of separation of powers. Furthermore, the comfort apparently derived by this Court from the "fact" that "there is nothing in our history . . . comparable to the imprisonment of a Member of Parliament in the Tower without a hearing." *United States v. Brewster*, O.T. 1971, U.S. , 40 L.W. 4996, 4998 (June 29, 1972) should not give similar comfort to Members of the Senate, in view of the historical evidence that this is simply not correct. The kangaroo court which, in 1798, convicted and sentenced Matthew Lyon, a key member of Congress, was motivated purely by partisan political considerations and was accomplished by a biased Federalist judge who would not even allow Lyon time to prepare his

Issues of this magnitude certainly should be decided only upon an adequate record and after full and complete argument by all parties, including the United States Senate. Neither is present in this case. The Solicitor General did not question the holding of the Court of Appeals that the acquisition of the documents by Senator Gravel for use in the subcommittee hearing was privileged. Accordingly, this issue was not argued by either party to the litigation or by the United States Senate. Nor, we hasten to point out, did this Court upon its grant of the cross petitions for writs of certiorari request that this additional issue be briefed and argued.

The question that should be ordered briefed and argued upon a reconsideration of this case is whether the acquisition of information by a Senator, including the receipt of allegedly classified material critical of Executive behavior, is necessary for effective Congressional deliberations and is therefore a constitutionally privileged legislative act.⁴

defense. See J. M. Smith, *Freedom's Fetters*, 221-241 (1956), and Senator Gravel's brief at 64-67. Similarly, the 1797 grand jury inquisition of Congressmen who criticized the administration's senseless war with France was subject to the judicial "supervision" of another Federalist judge who aptly fits Mr. Justice Harlan's description of "lackeys of the . . . monarchs." *United States v. Johnson*, 383 U.S. at 181. See M. Peterson, *Thomas Jefferson and the New Nation*, 605 (1970). - It was this grand jury investigation which prompted the memorable protest of Jefferson and Madison. See Senator Gravel's brief at 53-58. Unless the Constitution is construed strictly, there is no guarantee that incidents such as this will not be repeated at other times of political passion.

⁴ Clearly, the mere label of "illegal" attached to the acquisition cannot divest the privilege. It is precisely where illegality enters that privilege plays its historic role. For example, the subpoena issued by Senator Eastland in *Dombrowski v. Eastland*, *supra*, was clearly violative of the Fourth Amendment. And, in the context of the legislative process, "receipt of stolen documents" means only that a Senator received the documents and *knew* that they were illegally acquired. This would necessitate the very inquiry into

That question requires full exposition of the realities of the legislative process; it cannot be decided by resort to judicial notice, particularly by judges who have no Congressional experience. Respect for the rights, privileges and obligations of a co-equal branch certainly requires no less than is asked for here.

Should the Petition for Rehearing be granted, Senator Gravel respectfully requests the Court to reconsider the standard governing the Speech or Debate privilege enunciated in the opinion. While we of course agree that "legislative acts" are not all encompassing, the purposes of the privilege can be realized only by including those customary duties of Congressmen which fulfill goals of representative government. This is the manner in which the privilege has always been construed in both this country and in England. Under this consistent standard, publication of legislative proceedings cannot be the subject of Executive and Judicial restraint. That this was the specific intention of the Framers may not be disputed by mere reference to an ill-starred English decision 50 years after the writing of our Constitution; the comprehensive protest of Jefferson and Madison must be given the weight it deserves.

the motives of a Senator in performing his legislative duties which the Speech or Debate Clause was designed to prevent.

Senator Gravel does not claim here, nor did he claim at any point in his briefs or oral argument, that he or his aides or other parties cannot be subpoenaed or questioned as to whether and under what circumstances the Senator or his delegates were involved as conspirators or principals in the purportedly unlawful theft of classified documents. Inquiries into a theft (e.g., "Did you break into the Pentagon?") differ *toto caelo* from a broad inquiry into receipt and motives. Thus far, the Government has not even hinted that it believes that Senator Gravel was involved in any such theft—for the simple reason that the Government knows that he was not. Should the Government change its mind and wish to pursue allegations of theft by the Senator or persons acting at his command, Senator Gravel would not oppose questioning to that extent, with a protective order assuring these limitations.

Conclusion.

For the foregoing reasons, Senator Gravel respectfully requests this Court to grant this petition for rehearing.

Respectfully submitted,

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CHARLES L. FISHMAN,

HARVEY A. SILVERGLATE,

Counsel for Senator Mike Gravel.

ZALKIND & SILVERGLATE,

Of Counsel.

Certificate of Counsel.

I, Robert J. Reinstein, a Member of the Bar of this Court, hereby certify that the within "Petition for Rehearing" is presented in good faith and not for delay.

Dated this 17th day of July, 1972.

ROBERT J. REINSTEIN,

1715 N. Broad Street,

Philadelphia, Pennsylvania 19122.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GRAVEL *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

No. 71-1017. Argued April 19-20, 1972—Decided June 29, 1972*

A United States Senator read to a subcommittee from classified documents (the Pentagon Papers), which he then placed in the public record. The press reported that the Senator had arranged for private publication of the Papers. A grand jury investigating whether violations of Federal law were implicated, subpoenaed an aide to the Senator. The Senator, as an intervenor, moved to quash the subpoena, contending that it would violate the Speech or Debate Clause to compel the aide to testify. The District Court denied the motion but limited the questioning of the aide. The Court of Appeals affirmed the denial but modified the protective order, ruling that congressional aides and other persons may not be questioned regarding legislative acts and that, though the private publication was not constitutionally protected, a common-law privilege similar to the privilege of protecting executive officials from liability for libel, see *Barr v. Matteo*, 360 U.S. 564, barred questioning the aide concerning such publication. Held:

1. The Speech or Debate Clause applies not only to a Member of Congress but also to his aide, insofar as the aide's conduct would be a protected legislative act if performed by the Member himself. (*Kilbourn v. Thompson*, 103 U.S. 168; *Dombrowski v. Eastland*, 387 U.S. 82; and *Powell v. McCormack*, 395 U.S. 486; distinguished. Pp. 7-15.

2. The Speech or Debate Clause does not extend immunity to the Senator's aide from testifying before the grand jury about the alleged arrangement for private publication of the Pentagon

*Together with No. 71-1026, *United States v. Gravel*, also on certiorari to the same court.

GRAVEL v. UNITED STATES

Syllabus

Papers, as such publication had no connection with the legislative process. Pp. 15-20.

3. The aide, similarly, had no nonconstitutional testimonial privilege from being questioned by the grand jury in connection with its inquiry into whether private publication of the Papers violated federal law. P. 20.

4. The Court of Appeals' protective order was overly broad in enjoining interrogation of the aide with respect to any act, "in the broadest sense," that he performed within the scope of his employment, since the aide's immunity extended only to legislative acts as to which the Senator would be immune. And the aide may be questioned by the grand jury about the source of classified documents in the Senator's possession, as long as the questioning implicates no legislative act. The order in other respects would suffice if it forbade questioning the aide or others about the conduct or motives of the Senator or his aides at the subcommittee meeting; communications between the Senator and his aides relating to that meeting or any legislative act of the Senator; or steps of the Senator or his aides preparatory for the meeting, if not relevant to third-party crimes. Pp. 20-22.

453 F. 2d 753, vacated and remanded.

WHITE, J., wrote the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion dissenting in part. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Mike Gravel, United States
Senator, -

71-1017 v.
United States.

United States, Petitioner,
71-1026 v.

Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[June 29, 1972]

Opinion of the Court by MR. JUSTICE WHITE, announced by MR. JUSTICE BLACKMUN.

These cases arise out of the investigation by a federal grand jury into possible criminal conduct with respect to the release and publication of a classified Defense Department study entitled "History of the United States Decision-Making Process on Viet Nam Policy." This document, popularly known as the "Pentagon Papers," bore a Defense security classification of Top Secret-Sensitive. The crimes being investigated included the retention of public property or records with intent to convert (18 U. S. C. § 641), the gathering and transmitting of national defense information (18 U. S. C. § 793), the concealment or removal of public records or documents (18 U. S. C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U. S. C. § 371).

Among the witnesses subpoenaed were Leonard S. Rodberg, an assistant to Senator Mike Gravel of Alaska

and a resident fellow at the Institute of Policy Studies, and Howard Webber, Director of M. I. T. Press. Senator Gravel, as intervenor,¹ filed motions to quash the subpoenas and to require the Government to specify the particular questions to be addressed to Rodberg.² He asserted that requiring these witnesses to appear and testify would violate his privilege under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1.

It appeared that on the night of June 29, 1971, Senator Gravel, as Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a meeting of the subcommittee and there read extensively from a copy of the Pentagon Papers.

¹ The District Court permitted Senator Gravel to intervene in the proceeding on Dr. Rodberg's motion to quash the subpoena ordering his appearance before the grand jury and accepted motions from Gravel to quash the subpoena and to specify the exact nature of the questions to be asked Rodberg. The Government contested Gravel's standing to appeal the trial court's disposition of these motions on the ground that, had the subpoena been directed to the Senator, he could not have appealed from a denial of a motion to quash without first refusing to comply with the subpoena and being held in contempt. *United States v. Ryan*, 402 U. S. 530 (1971); *Cobbledick v. United States*, 309 U. S. 323 (1940). The Court of Appeals, *United States v. Doe*, 455 F. 2d 753, 756-757 (CA1 1972), held that because the subpoena was directed to third parties, who could not be counted on to risk contempt to protect intervenor's rights, Gravel might be "powerless to avert the mischief of the order" if not permitted to appeal, citing *Perlman v. United States*, 247 U. S. 7, 13 (1918). The United States does not here challenge the propriety of the appeal.

² Dr. Rodberg, who filed his own motion to quash the subpoena directing his appearance and testimony, appeared as *amicus curiae* both in the Court of Appeals and this Court. Technically, Rodberg states, he is a party to 71-1026, insofar as the Government appeals from the protective order entered by the District Court. However, since Gravel intervened, Rodberg does not press the point. Brief of Leonard S. Rodberg as *Amicus Curiae* 2, n. 2.

He then placed the entire 47 volumes of the study in the public record. Rodberg had been added to the Senator's staff earlier in the day and assisted Gravel in preparing for and conducting the hearing.³ Some weeks later there were press reports that Gravel had arranged for the papers to be published by Beacon Press⁴ and that members of Gravel's staff had talked with Webber as editor of M. I. T. Press.⁵

The District Court overruled the motions to quash and to specify questions but entered an order proscribing certain categories of questions. *United States v. Doe*, 332 F. Supp. 930 (Mass. 1971). The Government's contention that for purposes of applying the Speech or Debate Clause the courts were free to inquire into the regularity of the subcommittee meeting was rejected.⁶ Because the Clause protected all legislative

³ The District Court found "that, 'as personal assistant to movant [Gravel], Dr. Rodberg assisted in preparing for disclosure and subsequently disclosing to movant's colleagues and constituents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.'" *United States v. Doe*, 332 F. Supp. 930, 932 (Mass. 1971).

⁴ Beacon Press is a division of the Unitarian Universalist Association, which appeared here as *amicus curiae* in support of the position taken by Senator Gravel.

⁵ Gravel so alleged in his motion to intervene in the Webber matter and to quash the subpoena ordering Webber to appear and testify. App. 15-18.

⁶ The Government maintained that Congress does not enjoy unlimited power to conduct business and that judicial review has often been exercised to curb extra-legislative incursions by legislative committees, citing *Watkins v. United States*, 354 U. S. 178 (1957); *McGrain v. Daugherty*, 273 U. S. 135 (1927); *Hentoff v. Ichord*, 318 F. Supp. 1175 (CAD 1970), at least where such incursions are unrelated to a legitimate legislative purpose. It was alleged that Gravel had "convened a special, unauthorized, and untimely meeting of the Senate Subcommittee on Public Works (at midnight on June 29, 1971), for the purpose of reading the documents and there-

acts, it was held to shield from inquiry anything the Senator did at the subcommittee meeting and "certain acts done in preparation therefor." *Id.*, at 935. The Senator's privilege also prohibited "inquiry into things done by Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *Id.*, at 937-938.⁷ The trial court, however, held the private republication of the documents was not privileged by the Speech or Debate Clause.⁸

after placed all unread portions in the subcommittee record, with Dr. Rodberg soliciting publication after the meeting." App. 9. The District Court rejected the contention: "Senator Gravel has suggested that the availability of funds for the construction and improvement of public buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war is properly within the concern of his subcommittee. The court rejects the Government's argument without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting inquiry into matters of legislative purpose and operations." *United States v. Doe*, 332 F. Supp. 930, 935 (Mass. 1971). Cases such as *Watkins*, *supra*, were distinguished on the ground that they concerned the power of Congress under the Constitution: "It has not been suggested by the government that the subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action. Also, the individual rights at stake in these proceedings are not those of a witness before a congressional committee or of a subject of a committee's investigation, but only those of a congressman and member of his personal staff who claim 'intimidation by the executive.'" *Id.*, at 736.

⁷ The District Court thought that Rodberg could be questioned concerning his own conduct prior to joining the Senator's staff and concerning the activities of third parties with whom Rodberg and Gravel dealt. *United States v. Doe*, 332 F. Supp. 930, 934 (Mass. 1971).

⁸ The protective order entered by the District Court provided as follows:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator

The Court of Appeals affirmed the denial of the motions to quash but modified the protective order to reflect its own views of the scope of the congressional privilege.. *United States v. Doe*, 455 F. 2d 753 (CA1 1972). Agreeing that Senator and aide were one for the purposes of the Speech or Debate Clause and that the Clause foreclosed inquiry of both Senator and aide with respect to legislative acts, the Court of Appeals also viewed the privilege as barring direct inquiry of the Senator or his aide, but not of third parties, as to the sources of the Senator's information used in performing legislative duties.⁹ Although it did not consider private republication by the Senator or Beacon Press to be protected by the Constitution, the Court of Appeals apparently held that neither Senator nor aide could be questioned about it because of a common law privilege akin to the judicially created immunity of executive officers from liability for libel contained in a news release issued in the course of their normal duties. See *Barr v. Matteo*, 360 U. S. 564 (1959). This privilege, fashioned by the Court of Appeals, would not

Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

⁹ The Court of Appeals thought third parties could be questioned as to their own conduct regarding the Pentagon Papers, "including their dealing with intervenors or his aides." *United States v. Doe*, 455 F. 2d 753, 761 (CA1 1972). The court found no merit in the claim that such parties should be shielded from questioning under the Speech or Debate Clause concerning their own wrongful acts, even if such questioning may bring the Senator's conduct into question. *Id.*, at 758, n. 2.

protect third parties from similar inquiries before the grand jury. As modified by the Court of Appeals, the protective order to be observed by prosecution and grand jury was:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment."

The United States petitioned for certiorari challenging the ruling that aides and other persons may not be questioned with respect to legislative acts and that an aide to a Member of Congress has a common-law privilege not to testify before a grand jury with respect to private republication of materials introduced into a subcommittee record. Senator Gravel also petitioned for certiorari seeking reversal of the Court of Appeals insofar as it held private republication unprotected by the Speech or Debate Clause and asserting that the protective order of the Court of Appeals too narrowly

protected against inquiries that a grand jury could direct to third parties. We granted both petitions. 405 U. S. 916 (1972).

I

Because the claim is that a Member's aide shares the Member's constitutional privilege, we consider first whether and to what extent Senator Gravel himself is exempt from process or inquiry by a grand jury investigating the commission of a crime. Our frame of reference is Art. I, § 6, cl. 1, of the Constitution.

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The last sentence of the clause provides Members of Congress with two distinct privileges. Except in cases of "Treason, Felony and Breach of the Peace," the clause shields Members from arrest while attending or traveling to and from a session of their House. History reveals, and prior cases so hold, that this part of the clause exempts Members from arrest in civil cases only. "When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." *Long v. Ansell*, 293 U. S. 76; 83 (1934) (footnote omitted). "Since . . . the terms treason, felony and breach of the peace, as used in the constitutional provision relied upon, excepts from the operation of privilege all criminal offenses,

the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit" *Williamson v. United States*, 207 U. S. 425, 446 (1908).¹⁰ Nor does freedom from arrest confer immunity on a Member from service of process as a defendant in civil matters, *Long v. Ansell, supra*, at 82-83, or as a witness in a criminal case. "The constitution gives to every man, charged with an offense, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a *subpoena*, in such cases." *United States v. Cooper*, 4 Dall. 341 (1800) (per Chase, J., sitting on Circuit). It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members. *Williamson v. United States, supra*; cf. *Burton v. United States*, 202 U. S. 344 (1906). Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons. Jefferson, *Manual of Parliamentary Practice*, S. Doc. No. 91-2 437 (1971).

In recognition, no doubt, of the force of this part of Clause 6, Senator Gravel disavows any assertion of general immunity from the criminal law. But he points

¹⁰ *Williamson*, United States Congressman, had been found guilty of conspiring to commit subornation of perjury in connection with proceedings for the purchase of public land. He objected to the court passing sentence upon him and particularly protested that any imprisonment would deprive him of his constitutional right to "go to, attend at and return from the ensuing session of Congress." *Williamson v. United States*, 207 U. S. 425, 432-433 (1908). The Court rejected the contention that the Speech or Debate Clause freed legislators from accountability for criminal conduct.

out that the last portion of Clause 6 affords Members of Congress another vital privilege—they may not be questioned in any other place for any speech or debate in either House. The claim is not that while one part of Clause 6 generally permits prosecutions for treason, felony and breach of the peace, another part nevertheless broadly forbids them. Rather, his insistence is that the Speech or Debate Clause at the very least protects him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. To us this claim is incontrovertible. The Speech or Debate Clause was designed to assure a coequal branch of the government wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting. Our decision is made easier by the fact that the United States appears to have abandoned whatever position it took to the contrary in the lower courts.

Even so, the United States strongly urges that because the Speech or Debate Clause confers a privilege only upon "Senators and Representatives," Rodberg himself has no valid claim to constitutional immunity from grand jury inquiry. In our view, both courts below correctly rejected this position. We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be treated as one," *United States v. Doe*, 455 F. 2d 753, 761 (CA1 1972); or, as the District Court put it: The "Speech or Debate Clause prohibits inquiry into things done by

Dr. Rodberg as the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *United States v. Doe*, 332 F. Supp. 930, 937-938 (Mass. 1971). Both courts recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U. S. 169, 181 (1966)—will inevitably be diminished and frustrated.

The Court has already embraced similar views in *Barr v. Matteo*, 360 U. S. 564 (1959), where in immunizing the Acting Director of the Office of Rent Stabilization from liability for an alleged libel contained in a press release, the Court held that the executive privilege recognized in prior cases could not be restricted to those of cabinet rank. As stated by Mr. Justice Harlan, the "privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and re-delegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Id.*, at 572-573 (footnote omitted).

It is true that the clause itself mentions only "Senators and Representatives," but prior cases have plainly not taken a literalistic approach in applying the privilege. The clause also speaks only of "Speech or Debate," but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. Committee reports, resolutions, and the act of voting are equally covered; "[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson*, 103 U. S. 168, 204 (1881), quoted with approval in *United States v. Johnson*, 383 U. S. 169, 179 (1966). Rather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threaten to control his conduct as a legislator. We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.

Nor can we agree with the United States that our conclusion is foreclosed by *Kilbourn v. Thompson*, *supra*, *Dombrowski v. Eastland*, 387 U. S. 82 (1967), and *Powell v. McCormack*, 395 U. S. 486 (1969), where the speech or debate privilege was held unavailable to certain House and committee employees. Those cases do not hold that persons other than Members of Congress are beyond the protection of the clause when they perform or aid in the performance of legislative acts. In *Kilbourn*, the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in na-

ture. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest. The Court quoted with approval from *Stockdale v. Hansard*, 9 Ad. & E. 1, 112 K. B. 1112 (1839): "So if the Speaker by authority of the House order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer," 103 U. S., at 202.¹¹ The Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act. The Court was careful to point out that the Members themselves were not implicated in the actual arrest, *id.*, at 200, and, significantly enough, reserved the question whether there might be circumstances in which "there may . . . be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." 103 U. S., at 204 (emphasis added).

Dombrowski v. Eastland, *supra*, is little different in principle. The Speech or Debate Clause there protected

¹¹ In *Kilbourn*, 103 U. S., at 198, the Court noted a second example, used by Mr. Justice Coleridge in *Stockdale*, 9 Ad. & E. at 225-226, 112 K. B., at 1196-1197: "'Let me suppose, by way of illustration, an extreme case; the House of Commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the House is pleaded as a justification. . . . In such a case as the one supposed, the plaintiff's counsel would insist on the distinction between power and privilege; and no lawyer can seriously doubt that it exists: but the argument confounds them, and forbids us to enquire, in any particular case, whether it ranges under the one or the other. I can find no principle which sanctions this.'"

a Senator, who was also a subcommittee chairman, but not the subcommittee counsel. The record contained no evidence of the Senator's involvement in any activity that could result in liability, 387 U. S., at 84, whereas the committee counsel was charged with conspiring with state officials to carry out an illegal seizure of records which the committee sought for its own proceedings. *Ibid.* The committee counsel was deemed protected to some extent by legislative privilege, but it did not shield him from answering as yet unproved charges of conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize.

Powell v. McCormack reasserted judicial power to determine the validity of legislative actions impinging on individual rights—there the illegal exclusion of a representative-elect—and to afford relief against House aides seeking to implement the invalid resolutions. The Members themselves were dismissed from the case because shielded by the Speech or Debate Clause both from liability for their illegal legislative act and from having to defend themselves with respect to it. As in *Kilbourn*, the Court did not reach the question “whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against the members of Congress where no agent participated in the challenged action and no other remedy was available.” 395 U. S., at 506 n. 26.

None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection. The three cases reflect a decidedly jaundiced view towards extending the clause so as to privilege illegal or unconstitutional con-

duct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings. In *Kilbourn*, the Sergeant-at-Arms was executing a legislative order, the issuance of which fell within the Speech or Debate Clause; in *Eastland*, the committee counsel was gathering information for a hearing; and in *Powell*, the Clerk and Doorkeeper were merely carrying out directions that were protected by the Speech or Debate Clause. In each case, protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate Clause protection did not attach.

None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn*-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So too in *Eastland*, as in this case, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in *United States v. Johnson*, 383 U. S. 169 (1966).¹²

¹² Senator Gravel is willing to assume that if he personally had "stolen" the Pentagon Papers, and that act were a crime, he could be prosecuted, as could aides or other assistants who participated in the theft. Consolidated Brief of Senator Gravel 93.

The United States fears the abuses that history reveals have occurred when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws. But these abuses, it seems to us, are for the most part obviated if the privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf,¹³ and if in all events the privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself. This view places beyond the Speech or Debate Clause a variety of services characteristically performed by aides for Members of Congress, even though within the scope of their employment. It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction. Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act. Thus our refusal to distinguish between Senator and aide in applying the Speech or Debate Clause does not mean that Rodberg is for all purposes exempt from grand jury questioning.

II

We are convinced also that the Court of Appeals correctly determined that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers was not protected speech or debate within the meaning of Art. I, § 6, cl. 1, of the Constitution.

¹³ It follows that an aide's claim of privilege can be repudiated and thus waived by the Senator.

Historically the English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House. *Stockdale v. Hansard*, 9 Ad. & E. 1, 114, 112 K. B. 1112, 1156 (1839), recognized that "[f]or speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity." But it was clearly stated that "if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher."¹⁴

¹⁴ *Stockdale* extensively reviewed the precedents and their interplay with the privilege so forcefully recognized in the Bill of Rights of 1689: "That the freedome of speech, and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament." 1 W. & M., Sess. 2, c. 2. From these cases, include *Rex v. Creevy*, 1 M. & S. 273, 105 Eng. Rep. 102 (K. B. 1813); *Rex v. Wright*, 8 T. R. 293, 101 K. B. 1396 (1799); *Rex v. Abingdon*, 1 ESP. 226, N. P. Cas. 337 (K. B. 1794); *Rex v. Williams*, 2 Show. K. B. 471, 89 Eng. Rep. 1048, it is apparent that to the extent English precedent is relevant to the Speech or Debate Clause there is little, if any, support for Senator Gravel's position with respect to republication. Parliament reacted to *Stockdale v. Hansard* by adopting the Parliamentary Papers Act of 1840, 3 and 4 Vict., c. 9, which stayed proceedings in all cases where it could be shown that publication was by order of a House of Parliament and was a bona fide report, printed and circulated without malice. See generally C. Wittke, *The History of English Parliamentary Privilege* (1921). Gravel urges that *Stockdale v. Hansard* was later repudiated in *Wason v. Walter*, [1868] 4 Q. B. 73, which held a proprietor immune from civil libel for an accurate republication of a debate in the House of Lords. But the immunity established in *Wason* was not founded in parliamentary privilege, *id.*, at 84, but upon analogy to the privilege for reporting judicial proceedings. *Id.*, at 87-90. The *Wason* court stated its "unhesitating and unqualified adhesion" to the "masterly judgments" rendered in *Stockdale* and characterized the question before it as whether republication, quite apart from any assertion of parliamentary privilege, was "in itself privileged and lawful." *Id.*, at 86-87. That the privileges for nonmalicious republication of parliamentary and judicial proceedings—later established as qualified—were considered as coextensive in all respects, *id.*,

This was accepted in *Kilboarn v. Thompson* as a "sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England" and as a reasonable basis for inferring "that the framers of the Constitution meant the same thing by the use of language borrowed from that source." 103 U. S., at 202.

Prior cases have read the Speech or Debate Clause "broadly to effectuate its purposes," *United States v. Johnson*, 383 U. S., at 180, and have included within its reach anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U. S., at 204; *United States v. Johnson*, 383 U. S., at 179. Thus, voting by Members and committee reports are protected; and we recognize today—as the Court has recognized before, *Kilbourn v. Thompson*, 103 U. S., at 204; *Tenney v. Brandhove*, 341 U. S. 367, 377–378 (1951)—that a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the "sphere of legitimate legislative activity." *Id.*, at 376.¹⁵

at 95, further underscores the inappositeness of reading *Wason* as based upon parliamentary privilege, which like the Speech or Debate Clause is absolute. Much later Holdsworth was to comment that at the time of *Wason* the distinction between absolute and qualified privilege had not been worked out and that the "part played by malice in the tort and crime of defamation" probably helped retard recognition of a qualified privilege. S. Holdsworth's *History of English Law* 377 (1926).

¹⁵The Court in *Tenney*, 341 U. S., at 376–377, was equally clear that "legislative activity" is not all-encompassing, nor may its limits be established by the Legislative Branch: "Legislatures may not of course acquire power by an unwarranted extension of privilege. The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby v. White*,

But the clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity. *United States v. Johnson* decided at least this much. “No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process.” 383 U. S., at 172. Cf. *Burton v. United States*, 202 U. S. 344, 367–368 (1906).

Legislative acts are not all-encompassing. The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but “only when necessary to prevent indirect impairment of such deliberations.” *United States v. Doe*, 455 F. 2d 753, 760 (CA1 1972).

2 Ld. Raym. 938, 3 *id.*, 20. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn v. Thompson*, 103 U. S. 108; *Marshall v. Gordon*, 243 U. S. 521; compare *McGrain v. Daugherty*, 273 U. S. 135, 176.”

Here private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the House; nor does questioning as to private publication threaten the integrity or independence of the House by impermissibly exposing its deliberations to executive influence. The Senator had conducted his hearings, the record and any report that was forthcoming were available both to his committee and the House. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication.¹⁶ We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.

There are additional considerations. Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers was a crime under an Act of Congress, it was not entitled to immunity under the Speech or Debate Clause. It also appears that the grand jury was

¹⁶ The sole constitutional claim asserted here is based on the Speech or Debate Clause. We need not address issues which may arise when Congress or either House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports or other materials. Of course, Art. I, § 5, cl. 3, requires that each House "keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy" This Clause has not been the subject of extensive judicial examination. See *Field v. Clark*, 143 U. S. 649, 670-671 (1892); *United States v. Ballin*, 144 U. S. 1, 4 (1892).

pursuing this very subject in the normal course of a valid investigation. The Speech or Debate Clause does not in our view extend immunity to Rodberg, as a Senator's aide, from testifying before the grand jury about the arrangement between Senator Gravel and Beacon Press or about his own participation, if any, in the alleged transaction, so long as legislative acts of the Senator are not impugned.

III

Similar considerations lead us to disagree with the Court of Appeals insofar as it fashioned, tentatively at least, a nonconstitutional testimonial privilege protecting Rodberg from any questioning by the grand jury concerning the matter of republication of the Pentagon Papers. This privilege, thought to be similar to that protecting executive officials from liability for libel, cf. *Barr v. Matteo*, 360 U. S. 564 (1959), was considered advisable "to the extent that a congressman has responsibility to inform his constituents" 455 F. 2d, at 760. But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute. The so-called executive privilege has never been applied to shield executive officers from prosecution for crime, the Court of Appeals was quite sure that third parties were neither immune from liability nor from testifying about the republication matter and we perceive no basis for conferring a testimonial privilege on Rodberg as the Court of Appeals seemed to do.

IV

We must finally consider, in the light of the foregoing, whether the protective order entered by the Court

of Appeals is an appropriate regulation of the pending grand jury proceedings.

Focusing first on paragraph two of the order, we think the injunction against interrogating Rodberg with respect to any act, "in the broadest sense," performed by him within the scope of his employment, overly restricts the scope of grand jury inquiry. Rodberg's immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune. The grand jury, therefore, if relevant to its investigation into the possible violations of the criminal law and absent Fifth Amendment objections, may require from Rodberg answers to questions relating to his or the Senator's arrangements, if any, with respect to republication or with respect to third party conduct under valid investigation by the grand jury, as long as the questions do not implicate legislative action of the Senator. Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.¹⁷

¹⁷ The Court of Appeals held that the Speech or Debate Clause protects aides as well as Senators and that while third parties may be questioned about the source of a Senator's information, neither aide nor Senator need answer such inquiries. The Government's position is that the aide has no protection under the Speech or Debate Clause and may be questioned even about legislative acts. A contrary ruling, the Government fears, would invite great abuse. On the other hand, Gravel contends that the Court of Appeals insufficiently protected the Senator both with respect to the matter of republication and with respect to the scope of inquiry permitted the grand jury in questioning third party witnesses with whom the Senator and his aides dealt. Hence, we are of the view that both the question of the aide's immunity and the question of the extent of that immunity are properly before us in this case. And surely we are not bound by the Government's view of the scope of the privilege.

Because the Speech or Debate Clause privilege applies both to Senator and aide, it appears to us that paragraph one of the order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee;¹⁸ (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing. We leave the final form of such an order to the Court of Appeals in the first instance, or, if that court prefers, to the District Court.

The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

¹⁸ Having established that neither the Senator nor Rodberg is subject to liability for what occurred at the subcommittee hearing, we perceive no basis for inquiry of either Rodberg or third parties on this subject. If it proves material to establish for the record the fact of publication at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose. We do not intend to imply, however, that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress. As for inquiry of Rodberg about third party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the Executive Branch.

SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Mike Gravel, United States
Senator,

71-1017 v.
United States.

United States, Petitioner,
71-1026 v.

Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[June 29, 1972]

MR. JUSTICE DOUGLAS, dissenting.

I would construe the Speech and Debate Clause¹ to insulate Senator Gravel and his aides from inquiry concerning the Pentagon Papers; and Beacon Press from inquiry concerning publication of them, for that publication was but another way of informing the public as to what had gone on in the privacy of the Executive Branch concerning the conception and pursuit of the so-called "war" in Vietnam. Alternatively, I would hold that Beacon Press is protected by the First Amendment from prosecution or investigations for publishing or undertaking to publish the Pentagon Papers.

Gravel, Senator from Alaska, was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He convened a meeting of the Subcommittee and read

¹ The Speech and Debate Clause included in Art. I, § 6, Cl. 1, of the Constitution provides as respects Senators and Representatives that "for any Speech or Debate in either House, they shall not be questioned in any other Place."

to it a summary of the so-called Pentagon Papers. He then introduced "the entire papers, allegedly some 47 volumes and said to contain seven million words, as an exhibit." — F. 2d —. Thereafter, he supplied a copy of the papers to the Beacon Press, a Boston publishing house, on the understanding that it would publish the papers without profit to the Senator. A grand jury was investigating the release of the Pentagon Papers and subpoenaed one Rodberg, an aide to Senator Gravel, to testify. Rodberg moved to quash the subpoena; and on the same day the Senator moved to intervene. Intervention was granted and in due course the Court of Appeals entered the following order which is now before us for review:

"(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

"(2) Dr. Leonard S. Rodberg may not be questioned about his own actions, in the broadest sense, including observations and communications, oral or written, by or to him, or coming to his attention, while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment."

I

Both the introduction of the Pentagon Papers by Senator Gravel into the record before his Subcommittee

and his efforts to publish them were clearly covered by the Speech and Debate Clause, as construed in *Kilbourn v. Thompson*, 103 U. S. 168, 204:

"It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it."²

One of the things normally done by a member "in relation to the business before it" is the introduction of documents or other exhibits in the record the committee or subcommittee is making. The introduction of a document into a record of the Committee or subcommittee by its Chairman certainly puts it in the public domain. Whether a particular document is relevant to the inquiry of the committee may be questioned by the Senate in the exercise of its power to prescribe rules for the governance and discipline of wayward members. But there is only one instance, as I see it, where supervisory power over that issue is vested in the courts, and that is where a witness before a committee is prosecuted for contempt and he makes the defense that the question he refused to answer was not germane to the legislative inquiry or within its permissible range. See *Uphaus v. Wyman*, 360 U. S. 72; *Kilbourn v. Thompson*, *supra*, at 190.

In all other situations, however, the judiciary's view of the motives or germaneness of a Senator's conduct

² And see *United States v. Johnson*, 383 U. S. 169, 172, 177; and *Tenney v. Brandhove*, 341 U. S. 367, 376.

before a committee is irrelevant. For, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney v. Brandhove*, 341 U. S. 367, 377. If there is an abuse, there is a remedy; but it is legislative, not judicial.

As to Senator Gravel's efforts to publish the Subcommittee record's contents, wide dissemination of this material as an educational service is as much a part of the Speech and Debate Clause philosophy as mailing under a frank a Senator or a Congressman's speech across the Nation. As mentioned earlier, "[i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. . . . The informing function of Congress should be preferred even to its legislative function." W. Wilson, *Congressional Government* 303 (1885), quoted with approval in *Tenney v. Brandhove*, 341 U. S. 367, 377 n. 6. "From the earliest times in its history, the Congress has assiduously performed an 'informing function,'" *Watkins v. United States*, 354 U. S. 178, 200 n. 33. "Legislators have an obligation to take positions in controversial political questions so that their constituents can be fully informed by them." *Bond v. Floyd*, 385 U. S. 116, 136.

We said in *United States v. Johnson*, 383 U. S. 169, 179, that the Speech and Debate Clause established a "legislative privilege" that protected a member of Congress against prosecution "by an unfriendly executive and conviction by a hostile judiciary" in order, as Mr. Justice Harlan put it, to ensure "the independence of the legislature." That hostility emanates from every stage of the present proceedings. It emphasizes the need to construe the Speech and Debate Clause generously, not niggardly. If republication of a Senator's speech in a newspaper carries the privilege, as it doubtless does, then republication of the exhibits introduced

at a hearing before Congress must also do so. That means that republication by Beacon Press is within the ambit of the Speech and Debate Clause and that the confidences of the Senator in arranging it are not subject to inquiry "in any other place" than the Congress.

It is said that though the Senator is immune from questioning as to what he said and did in preparation for the committee hearing and in conducting it, his aides may be questioned in his stead. Such easy circumvention of the Speech and Debate Clause would indeed make it a mockery. The aides and agents such as Beacon Press must be taken as surrogates for the Senator and the confidences of the job that they enjoy are his confidences that the Speech and Debate Clause embrace.

II

The secrecy of documents in the Executive Department has been a bone of contention between it and Congress from the beginning.* Most discussions have

* See Note, Developments In The Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1207-1215 (1972); Note, The Right of Government Employees to Furnish Information to Congress: Statutory and Constitutional Aspects, 57 Va. L. Rev. 885, 885-887 (1971); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U. C. L. A. L. Rev. 1044 (1965); Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 Calif. L. Rev. 3 (1959); *Executive Privilege: The Withholding of Information by the Executive*, Hearings on S. 1425 before the Subcommittee on Separation of Power of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971). There is no express statutory authority for the classification procedure used currently by the bureaucracies, although it has been claimed that Congress has recognized it in such measures as the exemptions from the disclosure requirements of the Freedom of Information Act, 5 U. S. C. § 552 (b) and the espionage laws, 18 U. S. C. §§ 792-799. Rather, the classification regime has been implemented through a series of executive orders described in Note, *Developments In The Law, supra*, at 1192-1198. It has also been claimed that several sections of Art. II (such as the

centered on the scope of the Executive privilege in stamping documents as "secret," "top secret," "confidential" and so on, thus withholding them from the eyes of Congress and the press. The practice has reached large proportions, it being estimated⁴ that

(1) Over 30,000 people in the Executive Branch have the power to wield the classification stamp.

(2) The Department of State, the Department of Defense, and the Atomic Energy Commission have over 20 million classified documents in their files.

(3) Congress appropriates approximately \$15 billion annually without most of its members or the public or the press knowing for what purposes the money is to be used.⁵

designation of the President as Commander-in-Chief of the Army and Navy) confer upon the Executive an inherent power to classify documents. See Report of the Commission on Government Security, S. Doc. No. 64, 85th Cong., 1st Sess., 158 (1957).

⁴ Executive Privilege: The Withholding of Information by the Executive, Hearing on S. 1125, Subcommittee on Separation of Powers, S. Judiciary Committee, 92d Cong., 1st Sess., 517-518 (1971). One estimate of the number of officials who can classify documents is even higher. In the Department of Defense alone, 803 persons have the authority to classify documents Top Secret; 7,687 have permission to stamp them Secret, and 31,048 have the authorization to denominate papers Confidential. United States Government Information Policies and Practices—The Pentagon Papers, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt. 2, at 599 (statement of David Cooke, Deputy Assistant Secretary of Defense).

⁵ Senator Fulbright, chairman of the Senate Foreign Relations Committee, recently testified that his committee had been so unsuccessful in obtaining accurate information about the Vietnam war from the Executive Branch that it was required to hire its own investigators and send them to Southeast Asia. Executive Privilege: The Withholding of Information By The Executive, Hearings before the Subcommittee on Separation of Power of the Senate Committee on the Judiciary 206 (1971).

The problem looms large as one of separation of powers. Woodrow Wilson wrote about it in terms of the "informing function" of Congress.⁶

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes and demands of public opinion."

That is a concern of the Congress. It is, however, no concern of the courts, as I see it, how a document

⁶ W. Wilson, *Congressional Government*, 303-304 (1885).

is stamped in an Executive Department or whether a committee of Congress can obtain the use of it. The federal courts do not sit as an *ombudsman*, refereeing the disputes between the other two branches. The federal courts do become vitally involved whenever their power is sought to be invoked either to protect the press against censorship as in *New York Times Co. v. United States*, 403 U. S. 713, or to protect the press against punishment for publishing "secret" documents or to protect an individual against his disclosure of their contents for any of the purposes of the First Amendment.

Forcing the press to become the Government's co-conspirator in maintaining state secrets is at war with the objectives of the First Amendment. That guarantee was designed in part to ensure a meaningful version of self-government by immersing the people in a "steady, robust, unimpeded and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination." *Caldwell v. United States*, ante, —, —; *Brandenburg v. Ohio*, 395 U. S. 444; *Stanley v. Georgia*, 394 U. S. 557, 564; *Lamont v. Postmaster*, 381 U. S. 301, 308; *N. Y. Times Co. v. Sullivan*, 376 U. S. 254, 270. As I have said elsewhere, e. g., *Caldwell*, supra; *Kleindienst v. Mandel*, ante, —, —, that Amendment is aimed at protecting not only speakers and writers but also listeners and readers. The essence of our form of governing was at the heart of Justice Black's reminder in the Pentagon Papers case that "[t]he press was protected so that it could lay bare the secrets of Government and inform the people." 403 U. S., at 717. Similarly, Senator Sam Ervin has observed: "When the people do not know what their government is doing, those who govern are not accountable for their actions—and accountability is basic to the democratic system. By using de-

vices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion." Ramsey Clark as Attorney General expressed a similar sentiment: "If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy." And see Meiklejohn, *The First Amendment is Absolute*, 1961 Sup. Ct. Rev. 254; *Press Freedoms Under Pressure: Report of the Twentieth Century Fund Task Force on the Government and the Press* 109-117 (1972) (Background Paper by Fred Graham on "Access to News"); M. Johnson, *The Government Secrecy Controversy* 39-41 (1967).

Jefferson in a letter to Madison dated December 20, 1787, asked "whether peace is best preserved by giving energy to the government, or information to the people." And he answered, "This last is the most certain, and the most legitimate engine of government." 6 Writings of Thos. Jefferson 392 (Memorial ed. 1903).

Madison at the time of the Whiskey Rebellion spoke in the House against a resolution of censure against the groups stirring up the turmoil against that rebellion.

"If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." Brant, *The Madison Heritage*, 35 N. Y. U. L. Rev. 882, 900.

Yet, as has been revealed by such exposes as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin "incident," and the Bay of Pigs invasion, the

⁷ Ervin, *Secrecy in a Free Society*, 213 *The Nation* 454, 456 (1971).

⁸ Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 20 *Ad. L. Rev.* 263, 264 (1967).

Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the officials' tool of suppression and it has been used to withhold information which in "99 1/2%" of the cases would present no danger to national security.⁹ To refuse to publish "classified" reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if it printed only the press releases or "leaks" it would become an arm of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government.¹⁰ By that test Beacon Press could with

⁹ Hearing before Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations 97 (1971); Cong. Horton, *The Public's Right to Know*, 77 Case & Comm. 3, 5 (1972). We are told that the military has withheld as confidential a large selection of photographs showing atrocities against Vietnamese civilians wrought by both communist and United States forces. Even a training manual devoted to the history of the Bolshevik revolution was dubbed secret by the military. Hearings, *supra*, at 966, 967 (testimony of former classification officer). And, ordinary newspaper clippings of criticism aimed at the military have been routinely marked secret. Hearings, *supra*, at 100. Former Justice and former Ambassador to the United Nations Arthur Goldberg has stated: "I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10% genuinely required restricted access for any significant period of time." *United States Government Policies and Practices—The Pentagon Papers*, Hearings before a Subcommittee of the House Committee on Government Operations, 92d Cong., 1st Sess., pt. I, at 12 (1971).

¹⁰ Moreover, I would not even permit a conviction for the publication of documents related to future and sensitive planning where the jury was permitted, as it was in *United States v. Drummond*, 354 F. 2d 132, 152 (CA2), to consider the fact that the documents had been

impunity reproduce the Pentagon Papers inasmuch as their content "is all history, not future events. None of it is more recent than 1968." *New York Times Co. v. United States*, 403 U. S. 713, 722, n. 3.

The late Justice Harlan in the Pentagon Papers case said that in that situation the courts had only two restricted functions to perform: *first*, to ascertain whether the subject matter of the dispute lies within the proper compass of the President's constitutional power; and *second* to insist that the head of the Executive Department concerned—whether State or Defense—determine if disclosure of the subject matter "would irreparably impair the national security." Beyond those two inquiries, he concluded, the judiciary may not go. 403 U. S., at 757-758.

My view is quite different. When the press stands before the court as a suspected criminal, it is the duty of the court to disregard what the prosecution claims is the executive privilege and to acquit the press or overturn the ruling or judgment against it, if the First Amendment and the assertion of the executive privilege conflict. For the executive privilege—nowhere made explicit in the Constitution—is necessarily subordinate to the express commands of the Constitution.

United States v. Curtiss-Wright Corp., 299 U. S. 304, involved the question whether a proclamation issued

classified by the Executive Branch pursuant to its present overbroad system which, in my view, unnecessarily sweeps too much nonsensitive information into the locked files of the bureaucracies. In general, however, I agree that there may be situations and occasions in which the right to know must yield to other compelling and overriding interests. As Professor Henkin has observed, many deliberations in Government are kept confidential, such as the proceedings of grand juries or our own Conferences, despite the fact that the breadth of public knowledge is thereby diminished. Henkin, *The Right To Know And The Duty To Withhold: The Case Of The Pentagon Papers*, 120 U. Pa. L. Rev. 271, 274-275 (1971).

by the President, pursuant to a Joint Resolution of the Congress, was adequate to sustain an indictment. The Court, in holding that it did, discussed at length the power of the President. The Court said that the power of the President in the field of international relations does not require as a basis an Act of Congress; but it added that his power "like every other governmental power, must be exercised in subordination to applicable provisions of the Constitution." *Id.*, at 320.

When the executive launches a criminal prosecution against the press, it must do so only under an Act of Congress. Yet Congress has no authority to place the press under the restraints of the executive privilege without "abridging" the press within the meaning of the First Amendment.

In related and analogous situations, federal courts have subordinated the executive privilege to the requirements of a fair trial.

Chief Justice Marshall in the trial of Aaron Burr ruled "That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession is not controverted." *United States v. Burr*, 25 Fed. Cas. 187, 191. Yet he "may have sufficient motives for declining to produce a particular paper and these motives may be such as to restrain the Court from enforcing its production." *Ibid.* A letter to the President, he said, "may relate to public concerns" and not "forced into public view." *Id.*, at 192. But where the paper was shown "to be essential to the justice of the case," *ibid.*, "the paper should be produced or the cause be continued." *Ibid.*

Jencks v. United States, 353 U. S. 657, is in that tradition. It was a criminal prosecution for perjury, the telling evidence against the accused being the testimony of Government investigators. The defense asked for contemporary notes made by agents at the time. Refusal

was based on their confidential character. We held that to be reversible error.¹¹

"We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, *Roviaro v. United States*, 353 U. S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *Id.*, at 672.

Congress enacted the so-called Jencks Act, 18 U. S. C. § 3500, regulating the use of government documents in criminal prosecutions. We sustained that Act. *Scales v. United States*, 367 U. S. 203, 258. Under the Act a defendant "on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a government witness in pos-

¹¹ In *Alderman v. United States*, 394 U. S. 165, we took a like course in requiring the prosecution to disclose to the defense records of unlawful electronic surveillance:

"It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant." *Id.*, at 184.

A different rule obtains in civil suits where the government is not the moving party but is a defendant and has specified the terms on which it may be sued. *United States v. Reynolds*, 345 U. S. 1, 12.

session of the Government touching the events or activities as to which the witness has testified at the trial The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian." *Campbell v. United States*, 365 U. S. 85, 92. And see *Clancy v. United States*, 365 U. S. 312.

The prosecution often dislikes to make public the identity of the informer on whose information its case rests. But his identity must be disclosed where his testimony is material to the trial. *Roviaro v. United States*, 353 U. S. 53. In other words, the desire for Government secrecy does not override the demands for a fair trial. And see *Scher v. United States*, 305 U. S. 251, 254. The constitutional demands for a fair trial, implicit in the concept of due process, *In re Murchison*, 349 U. S. 133, 136, override the Government's desire for secrecy, whether the identity of an informer or the executive privilege be involved. And see *Smith v. Illinois*, 390 U. S. 129.

The requirements of the First Amendment are not of lesser magnitude. They override any claim to executive privilege. As stated in *United States v. Curtiss-Wright Corp.*, *supra*, the class of executive privilege "like every other governmental power, must be exercised in subordination to applicable provisions of the Constitution." 299 U. S., at 320.

III

Aside from the question of the extent to which publishers can be penalized for printing classified documents, surely the First Amendment protects against all inquiry into the dissemination of information which, although once classified, has become part of the public domain.

To summon Beacon Press through its officials before the grand jury and to inquire into why it did what it did and its publication plans is "abridging" the freedom

of the press contrary to the command of the First Amendment. In light of the fact that these documents were part of the official Senate record,¹² Beacon Press has violated no valid law, and the grand jury's scrutiny of it reduces to "[e]xposure purely for the sake of exposure." *Uphaus v. Wyman*, *supra*, at 82 (dissenting opinion). As in *United States v. Rumely*, 345 U. S. 41, where a legislative committee inquired of a publisher of political tracts as to its customers' identities, "[i]f the present inquiry were sanctioned, the press would be subject to harassment that in practical effect might be as serious as censorship." *Id.*, 57 (concurring opinion). Under our Constitution the Government has no surveillance over the press. That includes, as we held in *New York Times Co. v. United States*, 403 U. S. 713, the prohibition against prior restraints. Yet criminal punishment for or investigations of what the press publishes, though a different species of abridgment, is nonetheless within the ban of the First Amendment.

The story of the Pentagon Papers is a chronicle of suppression of vital decisions to protect the reputations and political hides of men who worked an amazingly successful scheme of deception on the American people. They were successful not because they were astute but because the press had become a frightened, regimented, submissive instrument, fattening on favors from those in power and forgetting the great tradition of reporting. To allow the press further to be cowed by grand jury inquiries and prosecution is to carry the concept of "abridging" the press to frightening proportions.

¹² Republication of what has filled the Congressional Record is commonplace. Newspapers, television, and radio use its contents constantly. I see no difference between republication of a paragraph and republication of material amounting to a book. Once a document or a series of documents is in the record of the Senate or House or one of its committees it is in the public domain.

What would be permissible if Beacon Press "stole" the Pentagon Papers is irrelevant to today's decision. What Beacon Press plans to publish is matter introduced into a public record by a Senator acting under the full protection of the Speech and Debate Clause.¹³ In light of the command of the First Amendment we have no choice but to rule that here government, not the press, is lawless.

I would affirm the judgment of the Court of Appeals except as to Beacon Press in which case I would reverse.

¹³ It is conceded that all of the material which Beacon Press has undertaken to publish was introduced into the Subcommittee record and that this record is open to the public. See Government's Brief, at 3.

SUPREME COURT OF THE UNITED STATES

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On Writs of Certiorari to
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[June 29, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, and MR. JUSTICE MARSHALL, join, dissenting.

The facts of this case, which are detailed by the Court, and the objections to over-classification of documents by the Executive, detailed by my Brother DOUGLAS, need not be repeated here. My concern is with the narrow scope accorded the Speech or Debate Clause by today's decision. I fully agree with the Court that a Congressman's immunity under the Clause must also be extended to his aides if it is to be at all effective. The complexities and press of congressional business make it impossible for a member to function without the close cooperation of his legislative assistants. Their role as his agents in the performance of official duties requires that they share his immunity for those acts. The scope of that immunity, however, is as important as the persons to whom it extends. In my view, today's decision so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system.

I

In holding that Senator Gravel's alleged arrangement with Beacon Press to publish the Pentagon Papers is not shielded from extra-senatorial inquiry by the Speech or Debate Clause, the Court adopts what for me is a far too narrow view of the legislative function. The Court seems to assume that words spoken in debate or written in congressional reports are protected by the Clause, so that if Senator Gravel had recited part of the Pentagon Papers on the Senate floor or copied them into a Senate report, those acts could not be questioned "in any other place." Yet because he sought a wider audience, to publicize information deemed relevant to matters pending before his own committee, the Senator suddenly loses his immunity and is exposed to grand jury investigation and possible prosecution for the publication. The explanation for this anomalous result is the Court's belief that "Speech or Debate" encompasses only acts necessary to the internal deliberations of Congress concerning proposed legislation. "Here," according to the Court, "private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the House." *Ante*, at 19. Therefore, "the Senator's arrangements with Beacon Press were not part and parcel of the legislative process." *Ibid*.

Thus the Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system. I speak, of course, of the legislator's duty to inform the public about matters affecting the administration of government. That this "informing function" falls into the class of things "generally done in a session of the House by one of its members in relation to the business before

it," *Kilbourn v. Thompson*, 103 U. S. 168, 204 (1881), was explicitly acknowledged by the Court in *Watkins v. United States*, 354 U. S. 178 (1957). In speaking of the "power of Congress to inquire into and publicize corruption, maladministration or inefficiency in the agencies of Government," the Court noted that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.*, at 200, n. 33.

We need look no further than Congress itself to find evidence supporting the Court's observation in *Watkins*. Congress has provided financial support for communications between its members and the public, including the franking privilege for letters, telephone and telegraph allowances, stationery allotments, and favorable prices on reprints from the Congressional Record. Congressional hearings, moreover, are not confined to gathering information for internal distribution, but are often widely publicized, sometimes televised, as a means of alerting the electorate to matters of public import and concern. The list is virtually endless, but a small sampling of contemporaneous hearings of this kind would certainly include the Kefauver hearings on organized crime, the 1966 hearings on automobile safety, and the numerous hearings of the Senate Foreign Relations Committee on the origins and conduct of the war in Vietnam. In short, there can be little doubt that informing the electorate is a thing "generally done" by the members of Congress "in relation to the business before it."

The informing function has been cited by numerous students of American politics, both within and without the Government, as among the most important responsibilities of legislative office. Woodrow Wilson, for example, emphasized its role in preserving the separation of powers by ensuring that the administration of public

policy by the Executive is understood by the legislature and electorate:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct." W. Wilson, *Congressional Government* 303 (1885).

Others have viewed the give-and-take of such communication as an important means of educating both the legislator and his constituents:

"With the decline of Congress as an original source of legislation, this function of keeping the government in touch with public opinion and of keeping public opinion in touch with the conduct of the government becomes increasingly important. Congress no longer governs the country; the Administration in all its ramifications actually governs. But Congress serves as a forum through which public opinion can be expressed, general policy discussed, and the conduct of governmental affairs exposed and criticized." *The Reorganization of Congress, A Report of the Committee on Congress of the American Political Science Association* 14 (1945).

Though I fully share these and related views on the

educational values served by the informing function; there is yet another and perhaps more fundamental interest at stake. It requires no citation of authority to state that public concern over current issues—the War, race relations, governmental invasions of privacy—has transformed itself in recent years into what many believe is a crisis of confidence, in our system of government and its capacity to meet the needs and reflect the wants of the American people. Communication between Congress and the electorate tends to alleviate that doubt by exposing and clarifying the workings of the political system, the policies underlying new laws and the role of the Executive in their administration. To the extent that the informing function succeeds in fostering public faith in the responsiveness of Government, it is not only an “ordinary” task of the legislator but one that is essential to the continued vitality of our democratic institutions.

Unlike the Court, therefore, I think that the activities of Congressmen in communicating with the public are legislative acts protected by the Speech or Debate Clause. I agree with the Court that not every task performed by a legislator is privileged; intervention before Executive departments is one that is not. But the informing function carries a far more persuasive claim to the protections of the Clause. It has been recognized by this Court as something “generally done” by Congressmen, the Congress itself has established special concessions designed to lower the cost of such communication, and, most important, the function furthers several well-recognized goals of representative government. To say in the face of these facts that the informing function is not privileged merely because it is not necessary to the internal deliberations of Congress is to give the Speech or Debate Clause an artificial and narrow reading unsupported by reason.

Nor can it be supported by history. There is substantial evidence that the Framers intended the Speech or Debate Clause to cover all communications from a Congressman to his constituents. Thomas Jefferson clearly expressed that view of legislative privilege in a case involving Samuel Cabell, Congressman from Virginia. In 1797 a federal grand jury in Virginia investigated the conduct of several Congressmen, including Cabell, in sending newsletters to constituents critical of the administration's policy in the war with France. The grand jury found that the Congressmen had endeavored "at a time of real public danger, to disseminate unfounded calumnies against the happy government of the United States, and thereby to separate the people therefrom; and to increase or produce a foreign influence, ruinous to the peace, happiness, and independence of these United States." Jefferson immediately drafted a long essay signed by himself and several citizens of Cabell's district, condemning the grand jury investigation as a blatant violation of the congressional privilege. Revised and joined by James Madison, the protest was forwarded to the Virginia House of Delegates. It reads in part as follows:

"... that in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully; it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should be of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence

between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

"That when circumstances required that the ancient confederation of this with the sister States, for the government of their common concerns, should be improved into a more regular and effective form of general government, the same representative principle was preserved in the new legislature, one branch of which was to be chosen directly by the citizens of each State, and the laws and principles remained unaltered which privileged the representative functions, whether to be exercised in the State or General Government, against the cognizance and notice of the coordinate branches, Executive and Judiciary; and for its safe and convenient exercise, the intercommunication of the representative and constituent has been sanctioned and provided for through the channel of the public post, at the public expense.

"That the grand jury is a part of the Judiciary, not permanent indeed, but in office, *pro hac vice* and responsible as other judges are for their actings and doings while in office: that for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation; ex-

pense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business; is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror punishment, all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive . . . ; and finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short periods." 8 The Works of Thomas Jefferson 322-327 (Ford ed. 1904).

Jefferson's protest is perhaps the most significant and certainly the most cogent analysis of the privileged nature of communication between Congressman and public. Its comments on the history, purpose and scope of the Clause leave no room for the notion that the Executive or Judiciary can in any way question the contents of that dialogue. Nor was Jefferson alone

among the Framers in that view. Aside from Madison, who joined in the protest, James Wilson took the position that a member of Congress "should enjoy the fullest liberty of speech, and . . . should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence." I Works of James Wilson 421 (McCloskey ed. 1967). Wilson, a member of the Committee responsible for drafting the Speech or Debate Clause, stated in plainest terms his belief in the duty of Congressmen to inform the people about proceedings in the Congress:

"That the conduct and proceedings of representatives should be as open as possible to the inspection of those whom they represent, seems to be, in republican government, a maxim, of whose truth or importance the smallest doubt cannot be entertained. That, by a necessary consequence, every measure, which will facilitate or secure this open communication of the exercise of delegated power, should be adopted and patronised by the constitution and laws of every free state, seems to be another maxim, which is the unavoidable result of the former." *Id.*, at 422.

Wilson's statements, like those of Jefferson and Madison, reflect a deep conviction of the Framers, that self-government can succeed only when the people are informed by their representatives, without interference by the Executive or Judiciary, concerning the conduct of their agents in government. That conviction is no less valid today than it was at the time of our founding. I would honor the clear intent of the Framers and extend to the informing function the protections embodied in the Speech or Debate Clause.

The Court, however, offers not a shred of evidence concerning the Framers' intent, but relies instead on the English view of legislative privilege to support its inter-

pretation of the Clause. Like the Court itself, *ante*, at n. 14, I have some doubt concerning the relevance of English authority to this case, particularly authority post-dating the adoption of our Constitution. But in any event it is plain that the Court has misread the history on which it relies. The Speech or Debate Clause of the English Bill of Rights was at least in part the product of a struggle between Parliament and Crown over the very type of activity involved in this case. During the reign of Charles II, the House of Commons received a number of reports about an alleged plot between the Crown and the King of France to restore Catholicism as the established religion of England. The most famous of these reports, Dangerfield's Narrative, was entered into the Commons Journal and then republished by order of the Speaker of the House, Sir William Williams, with the consent of Commons. In 1686, after James II came to the throne, informations charging libel were filed against Williams in King's Bench. Despite the arguments of his attorney, Sir Robert Atkyns, that the publication was necessary to the "counselling" and "enquiring" functions of Parliament, Williams' plea of privilege was rejected and he was fined £10,000. Shortly after Williams' conviction James II was sent into exile, and a committee was appointed by the House of Commons to report upon "such things as are absolutely necessary for securing the Laws and Liberties of the Nation." 9 Grey's Debates 37. In reporting to the House, the chairman of the committee stated that the provision for freedom of speech and debate was included "for the sake of one. . .". Sir William Williams, who was punished out of Parliament for what he had done in Parliament." *Id.*, at 81. Following consultation with the House of Lords, that provision was included as part of the English Bill of Rights, and the judgment against Williams was declared by Commons "illegal and sub-

versive of the freedom of parliament." I Townsend, *Memoirs of the House of Commons* 414 (2d ed. 1844).

Although the origins of the Speech or Debate Clause in England can thus be traced to a case involving republication, the Court, citing *Stockdale v. Hansard*, 9 Ad. & E. 1, 112 K. B. 1112 (1839), says that "English legislative privilege was not viewed as protecting republication of an otherwise immune libel on the floor of the House." *Ante*, at 16. That conclusion reflects an erroneous reading of precedent. *Stockdale* did state that "if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher." *Id.*, at 114, 112 K. B., at 1156. But *Stockdale* concerned only the publisher's liability, not that of a member of Parliament; thus it has little bearing on the instant case. Furthermore, contrary to the Court's assertion, *ante*, at n. 14, even the narrow result of *Stockdale* was repudiated 30 years later in *Wason v. Walter*, [1868] 4 Q. B. 73, for reasons strikingly similar to those expressed by Jefferson in his protest.¹ In my view,

¹ In *Wason* the proprietor of the London Times was sued for printing an account of a libellous debate in the House of Lords. The Court agreed with *Stockdale* that the House did not have final authority to determine the scope of its privileges and thus could not confer immunity on any publisher merely by ordering a document printed and then declaring it privileged. Indeed the *Wason* Court gave its "unhesitating and unqualified adhesion" to *Stockdale* on that point. *Id.*, at 86. The only issue for the Court, therefore, was whether the publication "is, independently of such order or assertion of privilege, in itself privileged and lawful." *Id.*, at 87. On that issue the Court severely criticized the reasoning of earlier cases, including *Stockdale*, stating that two of the Justices in that case had expressed a "very shortsighted view of the subject." *Id.*, at 91. The Court held that so long as the republication was accurate and in good faith, it could not be the basis of a libel action; and the member himself was privileged to publish his speech "for the information of his constituents." *Id.*, at 95. Relying not on the Parliamentary Papers Act of 1840, which was enacted in response to *Stockdale*, but on the analogy to

therefore, the English precedent, if relevant at all, supports Senator Gravel's position here.

Thus, from the standpoint of function or history, it is plain that Senator Gravel's dissemination of material,

judicial reports and the need for an informed public; the Court stated:

"It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large?" *Id.*, at 89.

The fact that the debate was published in violation of a standing order of Parliament was held to be irrelevant. "Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings . . . [A]ny publication of its debates made in contravention of its orders would be a matter between the house and the publisher." *Id.*, at 95.

Whether *Wason* was based on parliamentary privilege or on an analogy to the publication of judicial proceedings is unimportant. What is important to the instant case is that *Wason* firmly rejected any implication in *Stockdale* that the informing function was not among the legislative activities that a member of Parliament was privileged to perform. Indeed that same conclusion was reached by Sir Gilbert Campion, a noted scholar, in his memorandum to the

placed by him in the record of a congressional hearing, is itself legislative activity protected by the privilege of speech or debate. Whether or not that privilege protects the publisher from prosecution or the Senator from senatorial discipline, it certainly shields the Senator from any grand jury inquiry about his part in the publication. As we held in *United States v. Johnson*, 383 U. S. 169 (1966), neither a Congressman, nor his aides, nor third parties may be made to testify concerning privileged acts or their motives. That immunity, which protects legislators "from deterrents to the uninhibited discharge of their legislative duty," *Tenney v. Brandhove*, 341 U. S. 367, 377 (1951), is the essence of the Clause, designed not for the legislators' "private indulgence but for the public good." *Id.*, at 377.

That privilege, moreover, may not be defeated merely because a court finds that the publication was irregular or the material irrelevant to legislative business. Legislative immunity secures "to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office . . . whether the exercise was regular, according

House of Commons' Select Committee on the Official Secrets Acts. After reviewing the republication cases through *Wason*, the memorandum concluded:

"If . . . a member circulated among his constituents a speech made by him in Parliament in which he had disclosed information [otherwise subject to the Official Secrets Acts], it might be held on the analogy of the principles which have been said to apply to prosecutions for libel that he could not be proceeded against for disclosing it to his constituents, unless, of course, the speech had been made in a secret session. Even if the suggested analogy is not admitted, it would be repugnant to common sense to hold that though the original disclosure in the House was protected by parliamentary privilege, the circulation of the speech among the member's constituents was not." Minutes of Evidence Taken before the Select Committee on the Official Secrets Acts 29 (1939).

to the rules of the house, or irregular and against their rules." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). Thus, if the republication of this committee record was unauthorized or even prohibited by the Senate rules, it is up to the Senate, not the Executive or Judiciary, to fashion the appropriate sanction to discipline Senator Gravel.

Similarly, the Government cannot strip Senator Gravel of the immunity by asserting that his conduct "did not relate to any pending Congressional business." Brief, at 41. The Senator has stated that his hearing on the Pentagon Papers had a direct bearing on the work of his Subcommittee on Buildings and Grounds, because of the effect of the Vietnam war on the domestic economy and the lack of sufficient federal funds to provide adequate public facilities. If in fact the Senator is wrong in this contention, and his conduct at the hearing exceeded the subcommittee's jurisdiction, then again it is the Senate that must call him to task. This Court has permitted congressional witnesses to defend their refusal to answer questions on the ground of nongermaneness. *Watkins v. United States*, 354 U. S. 178 (1957). Here, however, it is the Executive that seeks the aid of the judiciary, not to protect individual rights, but to extend its power of inquiry and interrogation into the privileged domain of the legislature. In my view the Court should refuse to turn the freedom of speech or debate on the Government's notions of legislative propriety and relevance. We would weaken the very structure of our constitutional system by becoming a partner in this assault on the separation of powers.

Whether the Speech or Debate Clause extends to the informing function is an issue whose importance goes beyond the fate of a single Senator or Congressman. What is at stake is the right of an elected representative to inform, and the public to be informed, about

matters relating directly to the workings of our Government. The dialogue between Congress and people has been recognized, from the days of our founding, as one of the necessary elements of a representative system. We should not retreat from that view merely because, in the course of that dialogue, information may be revealed that is embarrassing to the other branches of government or violates their notions of necessary secrecy. A member of Congress who exceeds the bounds of propriety in performing this official task may be called to answer by the other members of his chamber. We do violence to the fundamental concepts of privilege, however, when we subject that same conduct to judicial scrutiny at the instance of the Executive.² The threat of "prosecution by an unfriendly executive and conviction by a hostile judiciary," *United States v. Johnson*, 383 U. S., at 179, which the Clause was designed to avoid, can only lead to timidity in the performance of this vital function. The Nation as a whole benefits from the congressional investigation and exposure of official corruption and deceit. It likewise suffers when that exposure is replaced by muted criticism, carefully hushed behind congressional walls.

II

Equally troubling in today's decision is the Court's refusal to bar grand jury inquiry into the source of documents received by the Senator and placed by him in the hearing record. The receipt of materials for use in a congressional hearing is an integral part of the preparation for that legislative act. In *United States v. Johnson*, 383 U. S., 169 (1966), the Court acknowl-

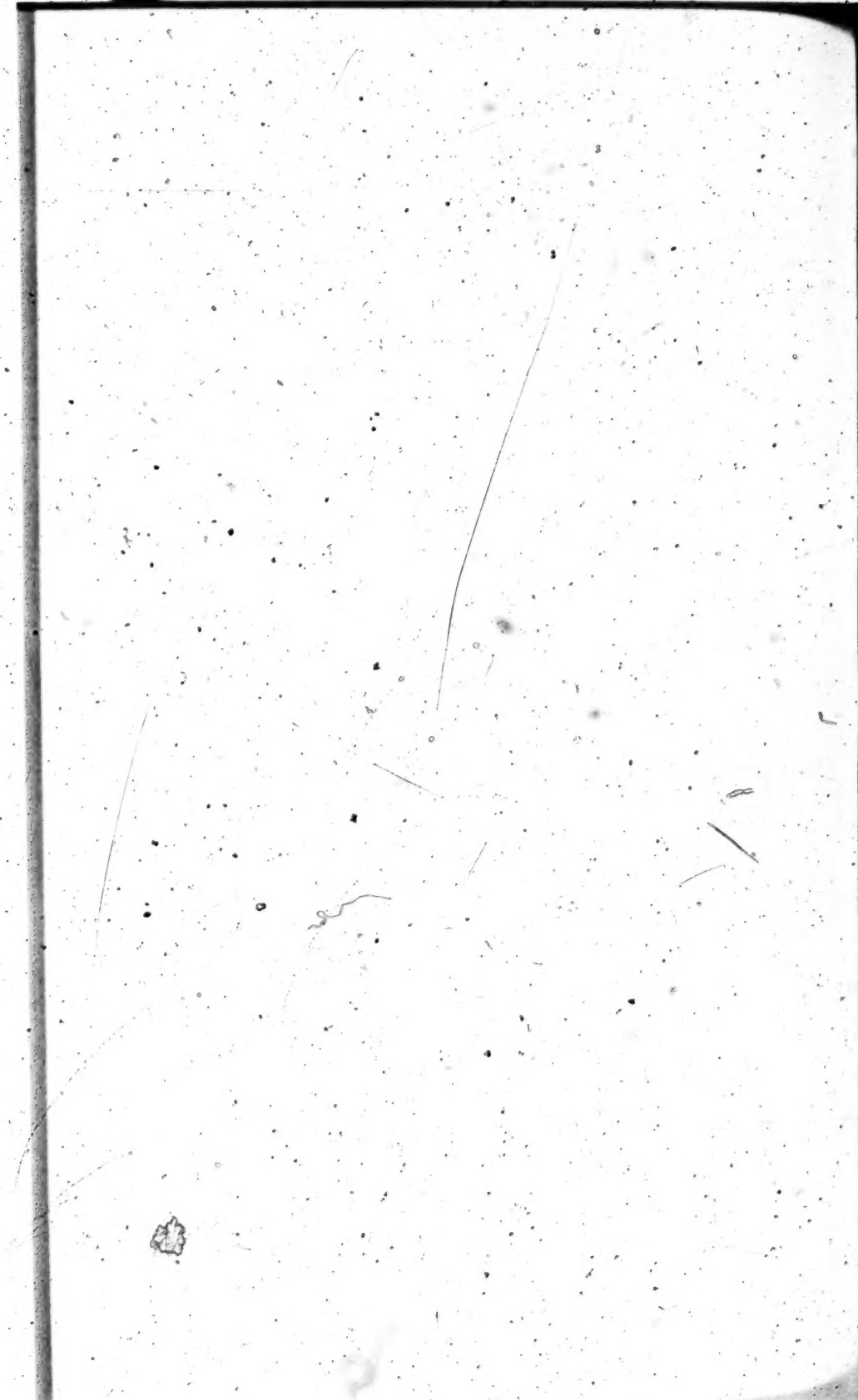
²Different considerations may apply, of course, where the republication is attacked, not by the Executive, but by private persons seeking judicial redress for an alleged invasion of their constitutional rights.

edged the privileged nature of such preparatory steps, holding that they, like the act itself and its motives, must be shielded from scrutiny by the Executive and Judiciary. That holding merely recognized the obvious—that speeches, hearings, and the casting of votes require study and planning in advance. It would accomplish little toward the goal of legislative freedom to exempt an official act from intimidating scrutiny, if other conduct leading up to the act and intimately related to it could be deterred by a similar threat. The reasoning that guided that Court in *Johnson* is no less persuasive today, and I see no basis, nor does the Court offer any, for departing from it here. I would hold that Senator Gravel's receipt of the Pentagon Papers, including the name of the person from whom he received it, may not be the subject of inquiry by the grand jury.

I would go further, however, and also exclude from grand jury inquiry any knowledge that the Senator or his aides might have concerning how the source himself first came to possess the Papers. This immunity, it seems to me, is essential to the performance of the informing function. Corrupt and deceitful officers of government do not often post for public examination the evidence of their own misdeeds. That evidence must be ferreted out, and often is, by fellow employees and subordinates. Their willingness to reveal that information and spark congressional inquiry may well depend on assurances from their contact in Congress that their identity and means of obtaining the evidence will be held in strictest confidence. To permit the grand jury to frustrate that expectation through an inquiry of the Congressman and his aides can only dampen the flow of information to the Congress and thus to the American people. There is a similar risk, of course, when the member's own House requires him to break the confidence. But the danger, it seems to me, is far

less if the members' colleagues, and not an "unfriendly executive" or "hostile judiciary," are charged with evaluating the propriety of his conduct. In any event, assuming that a Congressman can be required to reveal the sources of his information and the methods used to obtain that information, that power of inquiry, as required by the Clause, is that of the Congressman's House, and of that House only.

I respectfully dissent.



SUPREME COURT OF THE UNITED STATES

Nos. 71-1017 AND 71-1026

Mike Gravel, United States
Senator,

71-1017 v.

United States.

United States, Petitioner,

71-1026 v.

Mike Gravel, United States
Senator.

On Writs of Certiorari to
the United States Court
of Appeals for the First
Circuit.

[June 29, 1972]

MR. JUSTICE STEWART, dissenting in part.

The Court today holds that the Speech or Debate Clause does not protect a Congressman from being forced to testify before a grand jury about sources of information used in preparation for legislative acts. This critical question was not embraced in the petitions for certiorari. It was not dealt with in the written briefs. It was addressed only tangentially during the oral arguments. Yet it is a question with profound implications for the effective functioning of the legislative process. I cannot join in the Court's summary resolution of so vitally important a constitutional issue.

In preparing for legislative hearings, debates and roll calls, a member of Congress obviously needs the broadest possible range of information. Valuable information may often come from sources in the Executive Branch or from citizens in private life. And informants such as these may be willing to relate information to a Congressman only in confidence, fearing that disclosure of their identities might cause loss of their jobs or harassment by their colleagues or employers. In fact, I should sup-

pose it to be self-evident that many such informants would insist upon an assurance of confidentiality before revealing their information. Thus, the acquisition of knowledge through a promise of nondisclosure of its source will often be a necessary concomitant of effective legislative conduct, if the members of Congress are properly to perform their constitutional duty.

The Court of Appeals for the First Circuit recognized the importance of the information gathering process in the performance of the legislative function. It held that the Speech or Debate Clause bars all grand jury questioning of a member of Congress regarding the sources of his information. The Court of Appeals reasoned that to allow a "grand jury to question a Senator about his sources would chill both the vigor with which legislators seek facts and the willingness of potential sources to supply them." *United States v. Doe*, 445 F. 2d 753, 758-759. The government *did not seek review of this ruling*, but rather sought certiorari on the question whether the Speech or Debate Clause bars a grand jury from questioning congressional aides about privileged actions of Senators or Representatives.¹

The Court, however, today decides, *sua sponte*, that a member of Congress may, despite the Speech or Debate

¹ As stated in its petition for certiorari, the Government asked us to consider

"Whether Article 1, Section 6, of the Constitution providing that . . . 'for any Speech or Debate in either House, the Senators and Representatives' . . . 'shall not be questioned in any other Place' bars a grand jury from questioning aides of members of Congress and other persons about matters that may touch on activities of a member of Congress which are protected Speech or Debate."

The Government also asked us to consider

"Whether an aide of a member of Congress has a common law privilege not to testify before a grand jury concerning private republication of material which his Senator-employer had introduced into the record of a Senate subcommittee."

We granted certiorari on both questions. 405 U. S. 916.

Clause, be compelled to testify before a grand jury concerning the sources of information used by him in the performance of his legislative duties, if such an inquiry "proves relevant to investigating possible third party crime." *Ante*, at 22 (emphasis supplied).² In my view, this ruling is highly dubious in view of the basic purpose of the Speech or Debate Clause—"to prevent intimidation [of Congressmen] by the executive and accountability before a possibly hostile judiciary." *United States v. Johnson*, 383 U. S. 169, 181.

Under the Court's ruling, a Congressman may be subpoenaed by a vindictive Executive to testify about informants who have not committed crimes and who have no knowledge of crime. Such compulsion can occur, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers; grand jury investigations are not limited in scope to specific criminal acts, and standards of materiality and relevance are greatly relaxed.³ But even if the Executive had reason to believe that a member of Congress had knowledge of a specific probable violation of law, it is by no means clear to me that the Executive's interest in the administration of justice must *always* override the public interest in having an informed Congress. Why should we not, given the tension between two competing interests, *each* of constitutional dimensions, balance the claims of the Speech or Debate Clause against the claims of the grand jury in the particularized contexts of specific cases? And why are not the Houses of Congress the proper institutions in most situations to impose sanctions upon a Representative or Senator who withholds infor-

² See also, *ante*, 15, 21.

³ See, e. g., *Wilson v. United States*, 221 U. S. 361; *Hendricks v. United States*, 223 U. S. 178, *United States v. Johnson*, 319 U. S. 503. See generally, *Holt v. United States*, 218 U. S. 245; *United States v. Costello*, 350 U. S. 359.

mation about crime acquired in the course of his legislative duties?"⁴

I am not prepared to accept the Court's rigid conclusion that the Executive may always compel a legislator to testify before a grand jury about sources of information used in preparing for legislative acts. For that reason, I dissent from that part of the Court's opinion that so inflexibly and summarily decides this vital question.

⁴ During oral argument, the Solicitor General virtually conceded, in the course of arguing that aides should not enjoy the same testimonial privilege as Congressmen, that a Senator could *not* be called before the grand jury to testify about the sources of his information:

"Q. Mr. Solicitor, am I correct that you wouldn't be able to question the Senator as to where he got the papers from?"

"A. Oh, Mr. Justice, we are not able to question the Senator about anything insofar as it relates to speech or debate.

"Q. Well, this was related; you agree, to speech and debate?"

"A. I am not contending to the contrary. . . ."

The following exchange also took place:

"Q. You can't ask a Senator where you got the material you used in your speech.

"A. Yes, Mr. Justice.

"Q. You can't.

"A. Yes."

At another point in the oral argument, the Solicitor General said that even when a Senator or Representative has knowledge of crime as a result of legislative acts "[t]hey can't be required to respond to questions with respect to their speeches and debates. That is a great and historic privilege which ought to be maintained which I fully support but which does not extend to any other persons than Senators and Representatives."

